IN THE

Supreme Court of the United States

October Term, 1944. No. 205.

In re:

CLYDE WILSON SUMMERS,

Petitioner.

On Writ of Certiorari to the Supreme Court of the State of Illinois.

BRIEF IN BEHALF OF THE AMERICAN FRIENDS SERVICE COMMITTEE AS FRIENDS OF THE COURT.

ZECHARIAH CHAFEE, JR.,
of the Rhode Island Bar,
HAROLD EVANS,
of the Pennsylvania Bar,
Counsel.

ERNEST ANGELL,
of the New York Bar,
WILLIAM DRAPER LEWIS,
CLAUDE C. SMITH,
THOMAS RAEBURN WHITE,
of the Pennsylvania Bar,
Of Counsel.

TABLE OF CONTENTS.

TABLE OF CONTENTS (Continued).

TABLE OF CASES.

TABLE OF CASES (Continued).

STATUTES, TEXTS, AND AUTHORITIES CITED.

STATUTES, TEXTS, AND AUTHORITIES CITED
(Continued.)

IN THE

Supreme Court of the United States.

No. 205. October Term, 1944.

In Re

CLYDE WILSON SUMMERS,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF IN BEHALF OF THE AMERICAN FRIENDS SERVICE COMMITTEE, AS FRIENDS OF THE COURT.

PRELIMINARY STATEMENT.

The American Friends Service Committee, which we represent, is a non-profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It is an agency of the several branches of the Religious Society of Friends in the United States conducting religious, philanthropic and relief work in the United States and foreign countries. By reason of the long established principles of this Religious Society relative to the issues of war and military service, the members of this Committee are impelled to sympathy with petitioner, whose right to practice law is here drawn in question on account of his draft exemption as a conscientious objector and because of his religious beliefs. The Committee is further prompted by the fact that the outcome of this case may seriously affect the rights of other conscientious objectors, both within and without the Religious Society of Friends.

All counsel have consented to our filing this brief.

DECISION OF THE COURT BELOW.

The only court below is the Supreme Court of Illinois. Its decision, in the form of two letters from the Chief Justice without reasons, is printed in the Transcript of Record (pp. 73-74). It has not been officially reported. This decision affirmed the action of the Committee on Character and Fitness for the Third Appellate District, which is summarized in the Transcript of Record (p. 3); this action also has not been officially reported.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. § 344 (b)).

STATEMENT OF THE CASE.

Clyde Wilson Summers, the petitioner, is a native-born citizen of the United States, and since 1929 a resident of the State of Illinois. He is about twenty-six years old (R. 5). His early life was spent on farms. While in high school, he engaged in debates and oratorical contests, and on entering the University of Illinois College of Commerce in 1935 he took the pre-law curriculum, with hopes of later going to law school (R. 65-66). After obtaining the degree of Bachelor of Science, with high honors in accountancy, he entered the College of Law in the same University in September, 1939, and graduated in June, 1942, receiving the degree of Doctor of Law (J. D.) with high honors (R. 61-62). He worked his way through both college and law school, reaching positions of responsibility (R. 5). During his last year in law school he was employed by the Wesley Foundation (the Methodist student organization) as Student Assistant to Rev. Paul Burt, its Director, who states that "I would only appoint some one in whom I have complete confidence and in whom I would be ready to place implicit trust." (R. 67.)

Petitioner is a member of the Methodist Church (S. R. 3-4). During his last five years at the university he was a very faithful attendant at Mr. Burt's church in Urbana and an active participant and leader in the Wesley Foundation, also spending two summer vacations in work with a religious group in New York. The depth of his religious convictions is plain from his own statements in the Record, and it is confirmed by the testimony of his associates (R. 5-26, 57-64, 67-71, S. R. 3-47).

As a result of his religious training and beliefs, petitioner is conscientiously opposed to participation in war in any form. He does not believe in the use of any force that requires the taking of human lives. He held these views as early as 1938, perhaps sooner (R. 6, 13-14, 68-72) and his sincerity is vouched for by fellow-students now in the army, who knew him intimately (R. 65, 70) as well as by his older associates (R. 62-63, 68-69). The Methodist Church, to which he belongs, is not an historic peace church, like the Religious Society of Friends, but its Doctrines, adopted in 1940, declare that "conscientious objection to war is a natural outgrowth of Christian desire for peace on earth" and "claim exemption from all forms of military preparation or service for all conscientious objectors who may be members of the Methodist Church." Such members, if they seek exemption, are stated to "have the authority and support of their church." (R. 10.)

The Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. § 301 ff.) hereinafter referred to as the Selective Service Act, was enacted while petitioner was a law student. He registered in the first draft,[1] and duly claimed exemption as a conscientious objector. His draft board classified him in 4-E without even questioning him and assigned him to "work of national importance under civilian direction," as section 5 (g) of the statute pre-

[1] The statement by Chief Justice Smith of the Supreme Court of Illinois, in a letter (Record, p. 74) that petitioner "refused to register" must be an oversight.

scribes (R. 5, 31-32). He was ready and willing to undertake such service [2] (R. 31-32). He took his physical examination, which he failed to pass, and in consequence he did not have to report to a conscientious objector camp. He is unassigned as physically unfit (R. 31-32). The correctness of these classifications by the draft board is nowhere questioned in the Record. Thus petitioner did everything required of him by the Selective Service Act of 1940.

After graduating with high honors from the College of Law in the University of Illinois (R. 62), petitioner in June, 1942, took the bar examination held under the supervision of the Board of Law Examiners, and was later informed that he received a passing grade. On August 5, 1942, he filed his application for admission to the Bar of the State of Illinois, together with the required affidavits as to his character and fitness (R. 2). At the time of filing, one of the Committee on Character and Fitness for the Third Appellate District (hereinafter called the Character Committee) questioned petitioner's fitness to practice law, because he had been registered and classified as a conscientious objector to war, and consequently failed to pass upon his admissibility. Later petitioner was given an opportunity to appear before the Character Committee *en banc* on November 27, 1942, when the members questioned him concerning his religious beliefs and training, and particularly as to the thought processes which led him to become a conscientious objector (R. 2, S. R. 3-47).

---

[2] Chief Justice Smith must have misunderstood the petition when he wrote (R. 74) that petitioner "refused to . . . participate in the present national emergency"; the whole Selective Service Act, according to its preamble, provides for the national emergency by ordering combatant training for some men and work of national importance under civilian direction for other men. The Chief Justice probably meant to say that petitioner claimed exemption from combatant training, to which most citizens are subject because sec. 5 (g) does not apply to them.

On January 5, 1943, petitioner was informed that a majority of the Character Committee had declined to sign a favorable certificate as to his character and fitness for admission to the Bar, and that the committee would not certify him to the Supreme Court of Illinois for admission. No findings in support of this decision were given (R. 3).

On August 2, 1943, petitioner by his counsel filed a petition in the Supreme Court of Illinois for an order upon the Character Committee to certify petitioner for admission to the bar and for an order for his admission to the practice of law in the State of Illinois (R. 1-56). This petition contended at length, among other points, that the action of the Character Committee was inconsistent with the Selective Service Act of 1940 (R. 41-45), and an arbitrary and unreasonable abuse of discretion in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 46-51), and a penalty imposed upon him because of his religious beliefs in violation of the same constitutional clause (R. 51-55). Among the exhibits annexed to this petition were numerous additional affidavits and letters supporting petitioner's fitness to practice law and speaking of his character in the highest terms (R. 61-73).

On September 20, 1943, the Supreme Court of Illinois made an entry in its records that the Chief Justice had sent two letters, informing Mr. Horace B. Garman, Secretary of the State Board of Bar Examiners, and petitioner, respectively, "that the Court is of the opinion that the report of the Committee on Character and Fitness should be sustained." (R. 73-74.) No reasons were given in either letter why petitioner was thought to lack character and fitness for the practice of law.

Meanwhile, despite these determinations of his want of moral fitness to be a lawyer, petitioner has been entrusted with training prospective lawyers. The Dean of the College of Law of the University of Toledo states that the petitioner "displays an extensive and sound knowledge of

law," and is "honest and sincere, dependable, careful and conscientious in every respect; that he respects the institutions of this nation and is a patriotic citizen with a fine sense of responsibility for the future of the country." (R. 63-64.)

A reading of the record (including the Return of the Supreme Court of Illinois to this Court's Rule to Show Cause, page 6) makes it clear that the Character Committee and the Illinois Supreme Court based their decision that petitioner was morally unfit to be a member of the bar solely on the ground of his being conscientiously opposed on religious grounds to participation in war and violence and of his being classified by his draft board in Class IV-E as one "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

QUESTIONS TO BE ARGUED IN THIS BRIEF.

This brief will present arguments in full on only two of the questions raised by this case:

I. Is it an unconstitutional invasion of religious freedom as guaranteed by the Fourteenth Amendment for a state court to reject an applicant for admission to the bar on the ground that he is a conscientious objector by reason of religious training and belief, when the applicant is otherwise well qualified in educational and intellectual attainments and in character and has always conducted himself lawfully?

In support of the unconstitutionality of this judicial action, we shall argue that such a rejection by a state court deprives the conscientious objector of liberty without due process of law through arbitrarily imposing a penalty on his religious beliefs and lawful acts inspired by those beliefs although his religious beliefs and consequent acts bear no reasonable relation to his fitness to practice law. We shall also contend that the state court denies him the equal pro-

tection of the laws by classifying conscientious objectors (or this particular conscientious objector) less favorably than other applicants, solely because of his religious beliefs and consequent lawful acts when such beliefs and acts furnish no reasonable basis for this separate and damaging classification. We shall also take the position that it is an improper and unconstitutional construction of the Illinois statutes and rules of court in regard to admission to the bar to interpret such general phrases as "character and moral fitness" "good moral character and general fitness to practice law" "moral character and good citizenship," so that they must necessarily include a willingness to bear arms in war or in other military service, and that these general phrases should be construed more narrowly in order to preserve their constitutionality by avoiding an interference with religious freedom.

II. Is it an invalid interference with an Act of Congress, namely the Selective Service Act of 1940, for a state court to reject an applicant for admission to the bar, who is otherwise well qualified, on the ground that his draft board has duly classified him in compliance with section 5 (g) of the said Act of Congress as a person "who by reason of religious training and belief, is conscientiously opposed to participation in war in any form" and has assigned him to "work of national importance under civilian direction" as the said Act of Congress orders?

It is important to notice that the first or constitutional question covers a much wider range of situations than the second or statutory question. The statutory question applies only to cases where the following factors are present: (1) a Selective Service Act is in force; (2) the applicant is the kind of conscientious objector who falls within the provisions of the Act dealing with the classification and separate training of conscientious objectors. For example, the statutory question would not have arisen in 1939 if an applicant had then been rejected because of religious scruples against bearing arms; and it would not have arisen for

a Methodist objector in 1943 if the present Selective Service Act had resembled the 1917 Act by recognizing as conscientious objectors only members of the historic peace churches like the Quakers. Yet the first or constitutional question would have arisen in both these situations. It will arise whenever a religious conscientious objector is rejected as a lawyer because of his religious beliefs, regardless of the existence or terms of federal military conscription.

On the other hand, the statutory question might become material in one hypothetical situation where religious freedom would not be involved. If Congress should extend the definition of conscientious objectors as widely as the British government has done, so as to include nonreligious objectors, then such an objector might assert that his rejection from the bar interfered with the action of Congress and yet be unable to invoke religious liberty; any appeal to the Fourteenth Amendment would have to rest on some other sort of "liberty" or on the equal protection clause.

INTRODUCTION TO THE ARGUMENT.

As representatives of the American Friends Service Committee, we believe that we can best aid the Court by confining our brief to the two issues just described, which concern religious freedom and the legal position of conscientious objectors in the national life. These are the aspects of the case in which the Committee and other members of the Religious Society of Friends are directly interested, because a decision adverse to petitioner may exclude from the profession of the law many persons who share his religious views as to war.

We do not suppose that the Justices of the Supreme Court of Illinois are merely rejecting petitioner as an isolated individual. We assume that their action in this case accords with the usual practice of courts to decide a particular case in accordance with a general rule of law, which will in future be applied to other persons similarly situated.

Otherwise these Justices would be unfairly discriminating against petitioner in violation of the equal protection of the laws as guaranteed by the Fourteenth Amendment.

Therefore, the rejection of petitioner as a lawyer, unless reversed by this Court, must be regarded as establishing a general rule against the admission of conscientious objectors to the Bar of the State of Illinois. The argument in the Return to the Rule to Show Cause about the inability of petitioner to take the oath to support the Constitution of Illinois would be equally applicable to members of the Religious Society of Friends whose religious views will not let them kill human beings. We can consequently anticipate that the privilege of practicing law in Illinois may henceforth be closed to Quakers and everybody else who is conscientiously opposed to participation in war. Furthermore, nothing in the reasoning of the Justices limits rejections to the duration of the present war or to individuals who have actually been drafted and made claims. So long as the present militia clause of the Illinois Constitution stands unchanged, its provisions as interpreted in the Return will make the possession of religious scruples against killing a sufficient proof of bad character. It is even possible that practicing lawyers in Illinois of otherwise unblemished character can be disbarred for such religious views because the reasoning of the Return must mean that they swore falsely when they were admitted.

Nor is the effect of petitioner's rejection necessarily confined to Illinois. Other states besides Illinois have constitutional provisions which might permit the legislature, under specified conditions, like war or the absence of a federal exemption, to subject religious conscientious objectors to compulsory service in the state militia. Unless this Court repudiates the argument of the Illinois Justices that a remotely possible disobedience to a hypothetical state statute imposing such militia service disqualifies any conscientious objector from taking the oath of an attorney to support his state constitution, then the highest court in

some of these states may adopt the same argument. As a result, conscientious objectors who are otherwise well qualified to practice law, may find themselves shut out from their chosen profession in state after state. The history of state sedition laws and teachers' oath laws and flag salute laws shows how restrictive measures supposedly promoting patriotism will run like wildfire across the country.

The rejection of prospective lawyers for their religious beliefs will not only injure the individuals concerned. What is far worse, it will lessen religious freedom in the United States and imperil the recognition accorded by Congress to the important principle that an American citizen can serve his country in other ways besides fighting.

We now take up the argument of the two main issues.

ARGUMENT.

I.

Religious freedom is unconstitutionally infringed when an applicant for admission to the bar of a state is rejected solely because he is a conscientious objector to war on religious grounds, especially when he is duly classified as such by his draft-board.

The Fourteenth Amendment declares:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

It is now well settled that the liberty thus protected against state interference includes religious liberty.

Mr. Justice Roberts, in *Cantwell v. Connecticut*, 310 U. S. 296, 303:

> "The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act."

See also *West Virginia State Board of Education v. Barnette*, 319 U. S. 624; *Jamison v. Texas*, 318 U. S. 413; *Murdock v. Pennsylvania*, 319 U. S. 105; *Martin v. Struthers*, 319 U. S. 141, concurring opinion; *Taylor v. Mississippi*, 319 U. S. 583; *Follett v. McCormick*, 321 U. S. 573. Cf. *United States v. Ballard*, 322 U. S. 78.

Since this Court has hitherto upheld religious liberty under the due process clause, we shall devote most of our constitutional argument to the application of this clause to the case at bar. We submit that the essential elements are present: (1) a State (2) is denying liberty of religion (3) without due process of law, that is, arbitrarily without any just or reasonable basis for its action. Each of these three points will be discussed. Finally, we shall consider, as a fourth point, the denial of equal protection of the laws.

1. The rejection by a state court of an application to the bar is action by a State.

Although this case does not involve any legislation expressly excluding conscientious objectors from the bar, the situation is substantially similar. The Supreme Court of Illinois, in rejecting petitioner's application for admission, was purporting to apply the standard of good moral character which is imposed upon prospective attorneys by general words in a statute and in a rule of court having the force of legislation.

The Illinois Constitution of 1870, Article VI, sec. 2, as construed in *People v. Peoples Stock Yards Bank*, 344 Ill. 462, 471, 176 N. E. 901, places control over membership in the bar in the Supreme Court of Illinois. The legislature forbids a person to practice law without a license from the Supreme Court (2 Jones Ill. Stat. § 9.01); requires a court certificate of "his good moral character." (*Id.* § 9.02.) The Illinois Civil Practice Act gives the Supreme Court "power to make rules of pleading, practice, and procedure" (18 *id.* § 104.002). That court, in pursuance of this power,

has promulgated Rule 58 on Admission to the Bar.[3] Section I of this Rule declares that persons may be admitted to practice as attorneys if they are "of good moral character" and fulfill other qualifications as to age, citizenship, and satisfactory passing of an examination. Section IX establishes a Committee on Character and Fitness in each appellate court district, which is to pass on each applicant "as to his character and moral fitness." It is to be furnished with affidavits from three persons acquainted with the applicant, each testifying that he is known "to be of good moral character and general fitness to practice law." Each applicant is to appear before the committee and furnish "such evidence of his moral character and good citizenship as in the opinion of the committee would justify his admission." If the committee is of the opinion that the applicant is "of approved character and moral fitness," it shall so certify to the Board of Bar Examiners and "the applicant shall thereafter be entitled to admission to the Bar." Section X empowers the committee to make inquiries relating to "the character and moral fitness" of applicants, including the right to obtain subpoenas and other writs from the court.

This Rule of Court is "an exertion of legislative power" by the State of Illinois. *King Mfg. Co. v. Augusta*, 277 U. S. 100; *Hamilton v. Regents*, 293 U. S. 245, 257. We shall later distinguish the substantive point in the *Hamilton* case, but the procedural point therein is plainly applicable, as construing section 237 of the Judicial Code (28 U. S. C. § 344), on which jurisdiction is based in the case at bar. Mr. Justice Butler said (p. 258):

> "The meaning of 'statute of any state' is not limited to acts of state legislatures. It is used to include any act legislative in character to which the

[3] 18 Jones Ill. Stat. (1944 Supp.) § 105.58. The entire Rule as amended is printed by the Justices in their Return to this Court's Rule to Show Cause, pp. 31-40.

State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law-making power."

In addition to the requirement of good character thus made by a statute and a rule of court, the Justices of the Supreme Court of Illinois also rely upon a different state statute. In their Return to this Court's Rule to Show Cause in this case (p. 6), they base their rejection of the petitioner upon his alleged inability to take the oath which is necessary for admission to the Illinois bar. In taking this position, the Justices are placing their own interpretation upon the statute (2 Jones Ill. Stat., § 9.04) which exacts this oath without any mention of the applicant's willingness to bear arms. (See infra p. 52.)

Even if the Supreme Court of Illinois were not proceeding under either a statute or a rule of court, its action would be state action within the Fourteenth Amendment. We concede that an issue under the due process clause is not raised by the charge that a state court has erroneously decided the facts or the state law in an ordinary litigation, characterized by proper procedure, even though it takes away a person's property or sends him to prison.

Central Land Co. v. Laidley, 159 U. S. 103, 112;
Tracy v. Ginzberg, 205 U. S. 170;
Worcester County Trust Co. v. Riley, 302 U. S. 292, 299.

But here we have something much more than an ordinary judicial mistake. When a state court construes an undefined standard like "breach of the peace" so as to restrict religious liberty, the due process clause is violated.

Cantwell v. Connecticut, 310 U. S. 296, 308;
See *American Federation of Labor v. Swing*, 312 U. S. 321;
Comment, 54 *Harvard Law Review* 1066.

A loose interpretation of "good moral character" so as to restrict religious liberty seems equally open to objection.

Moreover, the Supreme Court of Illinois in the case at bar was not deciding litigation of the usual sort. In affirming the action of the Committee on Character and Fitness, rejecting a conscientious objector on religious grounds, it was exercising the broad powers over the administration of justice which were vested in it by the state constitution. It was selecting the persons who were to take part in the administration of justice, which is like what a judge does when he selects jurymen. When a state judge in selecting jurymen excludes persons on racial grounds, this is state action violating the Fourteenth Amendment.

Ex parte Virginia, 100 U. S. 339.

When state judges in selecting attorneys exclude persons on religious grounds, we submit that this is likewise state action within the same Amendment. As the present Chief Justice said in *United States v. Classic*, 313 U. S. 299, 326:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

2. Religious liberty is in fact gravely impaired and the free exercise thereof is in fact prohibited by the exclusion of religious objectors to war from the practice of law.

a. Religious liberty extends to the belief on religious grounds that participation in war is wrongful.

The case at bar involves only beliefs and lawful acts in pursuance thereof. The petitioner has violated no law. At every step he has done just what he was told to do by Congress, the Selective Service Regulations, and his Draft Board. We do not need to consider the legal position of persons who have actually violated the Selective Service Act or similar statutes from religious motives.

That conscientious scruples against participation in war are an important part of the beliefs of the Society of

Friends, the Mennonite Church, and the Church of the Brethren has long been a familiar fact in this country. The representatives of these historic peace churches wrote the President, shortly before the introduction of the Selective Service Bill in Congress about

> "the historic and unbroken convictions of these groups against war and their devotion to peace and goodwill. These attitudes grew out of deep religious convictions based on the spirit and teachings of Jesus and are a part of a way of life which we believe cherishes the highest values for all men." [4]

The convictions of the Religious Society of Friends may be more fully stated as follows: [5]

For almost three hundred years the Society of Friends, commonly called Quakers, have maintained their testimony against all war and for freedom of conscience and religious liberty. They have believed that lasting good can be accomplished not by war and violence but only by service and an appeal to the divine spark in the life of every man. They have therefore opposed conscription by the State, though encouraging their members to give public service in such constructive ways as their consciences will permit. Especially have they been opposed to military conscription, because it is a part of the war system and violates their deep-seated belief in the sacredness of the personality of every individual and of the principles which Jesus lived and taught. They have been deeply attached to democracy, because in democracy the State exists for the people and not the people for the State, and because in a true democracy the individual citizen has the greatest opportunity for spiritual, intellectual and physical development.

[4] Letter to President Roosevelt, Jan. 10, 1940, reprinted in Compulsory Military Training and Service: Hearings before the Committee on Military Affairs, United States Senate, 76th Cong. 3d Sess., on S. 4164 (1940) p. 318. This document is hereafter cited as Senate Hearings.

[5] See the statement on behalf of the Religious Society of Friends, Senate Hearings, pp. 160-165.

The petitioner's position is substantially similar, although he is a Methodist. His objections to war clearly rest on religious grounds, as shown by his examination before the Character Committee (S. R. 6-10, 14-22, 32-34, 38-39), his letter to its secretary (R. 57-61), and his petition to the Supreme Court of Illinois. (R. 5-16, 20-22, 25-26.) His classification in IV-E by his draft board must have been based on religious grounds—the Selective Service Act so requires.

We submit that liberty to entertain conscientious objections to war is part of the "free exercise" of religion.

b. The exclusion from the practice of law of adherents of a particular religious belief is in fact a serious impairment of the free exercise of religion.

It is true that the State of Illinois is not suppressing the historic peace churches. It is not prosecuting petitioner or others who share his beliefs for going to their own churches and for worshipping God as they please. Hence the Illinois Supreme Court may argue that they are not denying religious liberty, but are merely refusing a privilege. The unsoundness of such a position was forcibly pointed out by Macaulay in his maiden speech in the House of Commons in 1833, advocating the removal of Jewish Disabilities. At that time Jews could not sit in Parliament or hold any public office because they had to take an oath "on the true faith of a Christian." Sir Robert Inglis, in defending these disabilities, declared that he had no intention of calling in question the principles of religious liberty and utterly disclaimed "persecution." Macaulay replied:*

> "It would, in his opinion, be persecution to hang a Jew, or to flay him, or to draw his teeth, or to imprison him, or to fine him; for every man who conducts himself peaceably has a right to his life and his limbs, to his personal liberty and his property. But it is not

* Macaulay, Speech on Jewish Disabilities, in Works (Trevelyan e. 1866) Vol. VIII, 100.

persecution, says my honorable friend, to exclude any individual or any class from office; for nobody has a right to office . . . He who obtains an office obtains it, not as a matter of right, but as a matter of favour.

"Does he really mean that it would not be wrong in the legislature to enact that no man should be a judge unless he weighed twelve stone, or that no man should sit in parliaments unless he were six feet high? . . . Surely, on consideration, he must admit that official appointments ought not to be subject to regulations purely arbitrary, to regulations for which no reason can be given but mere caprice, and that those who would exclude any class from public employment are bound to show some special reason for the exclusion. . . .

"He will not admit that Jews are persecuted. And yet I am confident that he would rather be sent to the King's Bench Prison for three months, or be fined a hundred pounds, than be subject to the disabilities under which the Jews lie."

To apply the supposed distinction to the facts before this Court, shall we say that Quakers are not denied religious liberty so long as they are not hanged like Mary Dyer, or, like Ann Coleman, made fast to the tail of a cart driven through eleven towns and whipped on the back, not exceeding ten stripes in each town?[7] Concede for the moment that membership in the bar is a public office as much as membership in the legislature. If Illinois should disqualify Quakers as legislators, would religious freedom be preserved? Surely, a brilliant law school graduate would rather pay a fine of five hundred dollars a year than be kept out of his chosen career at the bar.

---

[7] On the treatment of Quakers in Massachusetts, see Brooks Adams, The Emancipation of Massachusetts (1919 ed.) Chapter V.

It is well known that direct interference with worship is by no means the only kind of attack on religious liberty. As Mr. Justice Murphy has said:

> "From ancient times to the present day, the ingenuity of man has known no limits in its ability to force weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs." (Dissenting in *Prince v. Massachusetts*, 321 U. S. 158, 175.)

Deprivation of various civil rights and opportunities to hold office has always been a valid method of discouraging an unpopular faith.

The men who adopted the First Amendment in 1791 were well aware of the contemporary situation of Dissenters and Roman Catholics in England.

> "Since the days of Charles II no one had been eligible for a seat in Parliament, or for any office either in the State or a Municipality, who did not first receive the Sacrament of the Lord's Supper, and take the oaths of allegiance, supremacy, and abjuration. . . . Even those scrupulous individuals, who were ready to admit the doctrines of the Church, but who had conscientious objections to taking an oath, were excluded from office by this unjust law. The whole system of government turned on the supremacy of the Church; and no one was allowed to have any practical influence in the affairs of the State except a churchman.
>
> "The supremacy, which the Church had thus obtained, was felt in almost every sphere of life. The dissenter had to pay rates for the repair of the parish church. . . . Marriage was a religious ceremony which, except in the case of the Quaker or of the Jew, could be performed only by a clergyman of the Church of England. . . . A Roman Catholic or a dissenter could not graduate at an English University. . . . All the great charitable endowments for educational purposes

were under the confrol of clergymen. No one but a churchman could easily obtain an education for his children; no one but a churchman could hope for advancement in the public service."[8]

The framers of the First Amendment must also have known of the civil disabilities of Roman Catholics in Ireland in 1791.[9] Every person graduating from the only university in Ireland had to take the oath of supremacy, denying the Pope's spiritual authority in the realm, which no sincere Roman Catholic could possibly do. The same oath was required from every person accepting any office, civil or military, and from every Roman Catholic schoolmaster. A Roman Catholic could not be a guardian of his own children or anybody else's, or bear arm, or own a horse good enough for a gentleman to ride. He was debarred from selling or mortgaging his land, from purchasing land or taking it on a long lease, and from inheriting land from a Protestant. The inter-marriage of Protestants and Roman Catholics was forbidden and made void. A Roman Catholic could not be a barrister or a solicitor, and a Protestant who married a Roman Catholic was equally disqualified.

Roman Catholics were first allowed to become barristers in England in 1792, the year after the First Amendment. Next year they were admitted to the army in Ireland but not in England. Jewish brokers on the London Stock Exchange were limited to twelve, by a rule of 1772. The first Jew was called to the bar in 1832, presumably by a change in the rules of the Inns of Court.[10] Jews were not allowed to sit in the House of Commons until 1858, a quarter of a century after Macaulay's speech.[11]

---

[8] Spencer Walpole, *A History of England from the Conclusion of the Great War in 1815* (1913 ed.) Vol. I, pp. 155-156.

[9] Ibid, Vol. II, pp. 236-240.

[10] Ibid, Vol. II, pp. 245-246; Vol. III, p. 311.

[11] Walpole, *History of Twenty-Five Years*, Vol. I, pp. 171-178.

In the American States after Independence, punishment for religious beliefs and prohibition of worship was largely a memory of the seventeenth century, but there were still gross inequalities of religious privileges even though the disabilities were much less than in England and Ireland. In Virginia, for example, salaries of Episcopalian ministers were paid out of general taxation and the vestries could tax members of other churches as well as their own for the relief of the poor.[12] Indeed, when the Revolution began nine of the thirteen colonies had established churches.[13] The desire to remove and avoid such familiar civil burdens must have been a main reason for Jefferson's Statute of Religious Toleration and the religious clauses of the First Amendment, as well as any fears of a revival of persecutions long past. This is shown by the fact that the only reference to religious freedom in the Constitution itself is the prohibition of test-oaths (Article VI, last clause), and by Jefferson's words in the Virginia Statute of Religious Toleration:

> "... that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right; that it tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it ..." (12 Henning's Stats. at Large p. 85—1785.)

---

[12] A. J. Beveridge, *Life of John Marshall*, Vol. I, pp. 221-222.

[13] C. & M. Beard, *Rise of American Civilization*, Vol. I, pp. 294-295. For details on civil disabilities at this time, see Mr. Justice Murphy dissenting, Jones v. Opelika, 316 U. S. 584, 622.

As further contemporaneous evidence of the meaning which was attached in 1791 to the brief phrase "free exercise of religion," we quote the much fuller declaration of religious liberty in the New Hampshire Constitution of 1784:[14]

> "Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and *no subject shall be hurt, molested, or restrained in his person, liberty or estate*, for worshipping God, in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion, provided he doth not disturb the public peace, or disturb others, in their religious worship." (Italics supplied.)

An equally full section of the Maryland Declaration of Rights of 1776 also invalidates civil disabilities by saying:[15]

> ". . . no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, etc."

This Court has repeatedly recognized that religious liberty in the Bill of Rights includes protection against civil disabilities. Mr. Chief Justice Waite, in the earliest decision on religious liberty, called attention to the influence of contemporary civil disabilities upon the drafting of the First Amendment.

Reynolds v. United States, 98 U. S. 145, 162.

See also Mr. Justice Roberts in *Cantwell v. Connecticut*, 310 U. S. 296, 303; Mr. Justice Frankfurter in *Miners-*

---

[14] Bill of Rights, Article V, 4 Thorpe, *American Charters, Constitutions, and Organic Laws* (1909) p. 245.

[15] Article XXXIII, 3 Thorpe, p. 1689.

ville School District v. Gobitis, 310 U. S. 586, 593, and dissenting in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 651.

This Court has several times struck down such disabilities. The exclusion of children from the public schools because of a particular religious belief was forbidden in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, where Mr. Justice Jackson pointed out that milder methods of coercion tend to ripen into a drastic refusal of toleration (pp. 640-641):

> "As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters."

A tax on particular religious activities was invalidated in *Murdock v. Pennsylvania*, 319 U. S. 105. Mr. Justice Douglas said (p. 113):

> "The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."

In a similar license tax case, *Follett v. McCormick*, 321 U. S. 573, Mr. Justice Murphy, concurring, said (p. 579):

> "It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds."

Lifelong exclusion of a conscientious objector from the bar is a far heavier burden than any tax, especially the small taxes involved in these two cases.

The imposition of civil penalties for religious beliefs or for conduct pursuant thereto, has been repudiated by other courts.

In *United States v. Hillyard*, 52 F. Supp. 612 (E. D. Washington) an action for contempt was dismissed against a Jehovah's Witness, drawn as a juror who refused to serve because of religious scruples.

Morgan v. Civil Service Commission, 131 N. J. L. 441, 36 A. 2d 898, is strongly in point because it involved a rejection from public office. A Jehovah's Witness who was first on the roster of eligibles to fill a vacancy as county bridge attendant was denied the appointment by administrative officials, because he declared his unwillingness on religious grounds to salute the flag. A statute required the appointment unless there was "good cause" to the contrary. The court reversed this action. Heher, J., said (36 A. 2d at 900-901):

> "The legislature has not ordained that the right to hold a public office or position may be conditioned upon observance of a compulsory flag-salute ritual. Nor would such a regulation be within its competency. . . . The legislative body does not possess the power thus to control the mind of the individual. [West Virginia State Board of Education v. Barnette cited.] . . . Freedom of religious conscience . . . is susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is not within the power of officialdom to coerce individual affirmation of a belief and an attitude of mind—to compel the individual to give utterance to what is not in his mind. The flag salute is a form of utterance. Coerced acceptance of a patriotic creed is beyond official authority. The conscience of the individual may not thus be trammeled. . . .
>
> "The cherished constitutional liberties guaranteed against impairment by State action prohibit governmental intrusions into the conscience of men. Government may not command individual belief or declaration of belief contrary to faith; nor may it enjoin the harboring of thoughts contrary to one's convictions.

> . . . The flag salute is deemed of much less consequence to the common weal than the religious and intellectual sovereignty of the individual."

In *O'Neill v. Hubbard*, 180 Misc. 214, 40 N. Y. S. 2d 202, the minister of a small religious sect was held entitled to a license to perform marriages, although the sect was not listed in the latest federal census as the statute required. This statute was held invalid because the right to have a marriage solemnized by a minister of one's own faith is an incident of the state guarantee of religious liberty.

The denial of a license to engage in a profession may thus harm others besides the applicant. If a minister is unable to perform marriages, this impairs the religious liberty of the members of his faith who want him to marry them. Similarly, if conscientious objectors cannot become lawyers, this lessens the opportunities of other conscientious objectors who want to assert their rights in court with the legal assistance which they prefer. In the numerous draft prosecutions and *habeas corpus* proceedings involving these persons, they are often represented by a lawyer who is himself a conscientious objector. If all men of such views are rejected from the bar or disbarred as soon as their opinions become known, their clients who belong to this religious minority are prejudiced by being forced to select counsel who may not understand their religious position.

Mr. Chief Justice Stone said in his dissenting opinion in *Minersville School District v. Gobitis*, 310 U. S. 586, 606:

> "We have previously pointed to the importance of a searching judicial injury into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities. See *United States v. Carolene Products Co.*, 304 U. S. 144, 152."

When clients who are conscientious objectors are deprived of a free choice of legal representatives, this tends to cur-

tail "the processes ordinarily to be relied on to protect minorities."

Although only one kind of civil disability has thus far been imposed in Illinois upon the petitioner and other conscientious objectors, more disabilities may logically follow if this be sanctioned. (We shall consider such a possibility shortly, while examining the question whether willingness to bear arms is reasonably related to fitness for public responsibilities.) Hence we submit that this particular religious inequality should be removed unless it be justified by some strong social benefit. That point will next be discussed.

3. There is no strong public need for the rejection of conscientious objectors from the bar which can justify this serious impairment of religious liberty.

Since the exclusion of conscientious objectors from the practice of law is a heavy penalty imposed upon them for their religious beliefs, the action of the Supreme Court of Illinois must be invalid unless it be essential for the attainment of some public purpose which is so important as to outweigh even the right to religious freedom. We do not contend that religious freedom is unlimited, but only that the limits must be justified by a plain and strong public need. We concede that there is a public need that lawyers should be fit to practice law, but the question here is whether unwillingness to be a soldier has any reasonable connection with unfitness to do the work of a lawyer. There are no authorities on the point because, so far as we can ascertain, no court has ever seen the slightest connection between these two diverse occupations.[16] Many Quakers who

[16] In re Sullivan, 57 Mont. 592, 189 Pac. 770, did not involve conscientious objections to war, but evasion of the draft and disloyal utterances. Even so, the applicant was suspended for seven months, while the petitioner has been permanently rejected.

would not bear arms, and many women who could not, have had distinguished and honorable legal careers. The judicial action in this case is of a sort new to America. It is a product of war psychology. Consequently it seems incumbent upon those responsible to demonstrate that some notable gain to society is accomplished by this unprecedented penalty on religious beliefs.

We shall argue that the exclusion of conscientious objectors from the legal profession serves no important public need. In the course of this argument, we shall question the existence of any reasonable relation between conscientious objections to war and bad character or unfitness to be a lawyer. Possibly the Illinois Supreme Court will admit this lack of connection, and contend instead (as they did in their Return to the Rule to Show Cause) that their refusal to admit the petitioner promotes national defense. We recognize that national defense is regarded as one of the strongest of public interests, but we shall ask how it has been furthered by the petitioner's rejection. The country has not gained a soldier; it has merely lost a lawyer. We shall give special and separate attention to the decisions of this Court on conflicts between religious beliefs and national defense, such as *United States v. MacIntosh* and *Hamilton v. Regents*, and we shall show that they are distinguishable from the case at bar. Because neither unfitness to practice law nor national defense is a reasonable ground for rejecting the petitioner, we shall submit that no sufficient need is served by the interference with religious liberty in this case.

In support of our position, we shall first present the authorities on restrictions on religious liberty in general, postponing the naturalization and military conscription cases for separate consideration later. We shall then give detailed discussion of the situation in the case at bar.

a. Religious liberty can only be impaired when it is overridden by a strong public interest.

It is not enough that *some* public interest is served by the restriction. Most of the statutes and ordinances which have been invalidated had a social purpose; otherwise they would hardly have obtained a majority vote. But only a very strong public interest will overcome religious liberty.

The general principle that religious liberty is not absolute has been frequently declared by this Court. Mr. Justice Field, in *Davis v. Beason*, 133 U. S. 333, 342-343:

> "It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

Mr. Justice Roberts, in *Cantwell v. Connecticut*, 310 U. S. 296, 303-304:

> "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."

Examples of religious practices which can be constitutionally prohibited, according to decisions or dicta of this Court and lower United States courts, are: bigamy and polygamy, which have "always been odious among the northern and western nations of Europe" and are "crimes by the laws of all civilized and Christian countries," *Reynolds v. United States*, 98 U. S. 145, *Davis v. Beason*, 133 U. S. 333; human sacrifice and promiscuous sexual intercourse, *Davis v. Beason* at pp. 343-344; thuggery and the religious belief in assassination, *Mormon Church v. United States*, 136 U. S. 1, 49, *Guiteau's Case*, 10 Fed. 161, 175 (Supreme Court, D. C.); circulation of obscene writings, *Knowles v. United States*, 170 Fed. 409, 411 (C. C. A. 8th); unlicensed street parades, *Cox v. New Hampshire*, 312 U. S. 549; using offensive and derisive language to any person lawfully in a public place, *Chaplinsky v. New Hampshire*, 315 U. S. 568; encouraging young children to sell religious publications on the streets in violation of statute, *Prince v. Massachusetts*, 321 U. S. 158; and refusal to pay taxes in furtherance of an end condemned by conscience as immoral, *Hamilton v. Regents of University of California*, 293 U. S. 245, 266, *Baxley v. U. S.*, 134 F. 2nd 937 (C. C. A. 4th).

We now turn to a second group of cases, which support our next proposition: It is not enough to validate a restriction on religious liberty that it serves *some* public need; that need must be so strong as to override great need for freedom. The ordinary elements of the police power which might justify a deprivation of "property" are not sufficient to constitute due process of law when "liberty" of religion is denied. The case at bar calls upon this Court to balance other social interests against freedom of religion; and whenever this happens, this Court makes freedom of religion weigh heavily in the scales.

Mr. Justice Jackson expressed this important principle in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 639:

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed *on such slender grounds.* They are susceptible of restriction only *to prevent grave and immediate danger* to interests which the State may lawfully protect." (Italics supplied.)

The need for a cohesive national unity was held in this case to be insufficient to override liberty of thought and religion.

In the case at bar there is no enactment by the elected representatives of the people in the Illinois legislature that conscientious objectors should be excluded from the bar. Even if there were a statute to that effect, we submit that it should not be conclusive evidence of the existence of a sufficient public need to validate the restriction on religion. This was stated by the present Chief Justice in dissenting from the judgment in the *Gobitis* case, which was overruled by the *Barnette* case, just quoted:

"The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. They presuppose the right of the individual to hold such opinions as he will and to give them reasonably

free expression, and his freedom, and that of the state as well, to teach and persuade others by the communication of ideas. The very essence of the liberty which they guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.

"History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection. It cannot conceive that in prescribing, as limitations upon the powers of government, the freedom of the mind and spirit secured by the explicit guaranties of freedom of speech and religion, they intended or rightly could have left any latitude for a legislative judgment that the compulsory expression of belief which violates religious convictions would better serve the public interest than their protection."

Minersville School District v. Gobitis, 310 U. S. 586, 604-605.

The case at bar presents less difficulty than the two decisions on the compulsory flag salute just discussed, because it raises no question as to the strength of the pre-

sumptive validity which should be attached to the action of a state legislature.

Illinois has placed no legislative ban on the admission of conscientious objectors to the bar.

Not only has Illinois not banned conscientious objectors by legislative action, but the Bill of Rights of the Illinois Constitution gives wide protection to religious opinions. Article II, Section 3, of the Constitution provides:

> "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."

To deprive petitioner of the privilege of practicing law in Illinois on account of his religious opinions would seem to be a violation of the spirit, if not of the letter, of this provision. However this may be, it is clear that the only statutory provision here involved is the requirement that applicants for admission to the bar must be of "good moral character" (2 Jones Ill. Statutes § 9.02). It is the judges of the Supreme Court of Illinois who have read into this statute an obligation to bear arms. Consequently, this Court is not now called upon to undertake the delicate task of substituting its judgment for the judgment of the elected law makers. Instead, this Court is asked to compare its interpretation of the broad legislative policy in the Illinois statute with the interpretation given to the same statute

by the state court. Thus there is here no problem of declaring a state statute invalid, but merely of saying that the legislation is construed so as not to conflict with religious liberty.

When the case at bar is approached in this way, we believe that the situation closely resembles that in *Cantwell v. Connecticut*, 310 U. S. 296. The Court was there asked to correct the state judges' interpretation of the broad common law concept of "breach of peace"; and here it is asked to correct their interpretation of the broad legislative concept "good moral character." In the *Cantwell* case this Court stressed the fact that the legislature had not specifically penalized the particular religious activity under consideration. Mr. Justice Roberts said (pp. 307-308):

> "Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature. . . .
>
> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly sup-

> press free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application."

In the *Cantwell* case, the general phrase was held to be improperly stretched by the state court to include and punish conduct with a religious object. In the case at bar, the judges of the Supreme Court of Illinois have contracted the general phrase "good moral character" in the statute and court rule—a phrase which is proper in itself—so as to exclude and penalize religious beliefs. We submit that this Court will undertake a familiar task if it corrects such a wide discretion in the application of a "concept of the most general and undefined nature," and shapes the judicial interpretation of the legislative standard so as to leave liberty of religion unimpaired.

The public interest in obtaining revenue from businesses was held not to be strong enough to justify an interference with religion in *Follett v. McCormick*, 321 U. S. 573. Mr. Justice Murphy, in concurring, used language which is appropriate to the employment of the licensing power against a particular religious belief in the case at bar. He said (p. 579):

> "It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds."

In *United States v. Ballard*, 322 U. S. 78, religious liberty under the First Amendment was considered to be so vital that the public must be subjected to some risk of fraudulent solicitation of funds through the mails for a religious organization of dubious sincerity. Although the

public interest in protection from fraud was the basis of the statute in question, this Court held that the position of the lower court invaded religious liberty by leaving the truth of the defendants' religious beliefs to the jury. Mr. Justice Douglas said (p. 86):

> "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. . . . Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . . If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views."

This language is applicable to aspects of the case at bar. The members of the Character Committee and the Supreme Court of Illinois should not be permitted to penalize a conscientious objector for his religious beliefs even though they cannot understand these beliefs and conclude that they are unsound.

Other cases have held that religious liberty required a sacrifice of the following public interests: promotion of national unity through ceremonies; regulation of street-selling; regulation of house-to-house canvassing; compul-

sory service of jurors; and the restriction of the power to perform marriages to clergymen of well-recognized denominations. (See cases cited supra page 24.)

It is important to observe that the public interest which had to give way to religious liberty in many of the cases just discussed was by no means negligible. The division of opinion in this Court in several cases concerning Jehovah's Witnesses was due to the difficulty of appraising the magnitude of the public interest involved. In comparison with the social purposes which were overridden by these decisions, the value of excluding conscientious objectors from the bar seems small indeed.

b. There is no strong public need for the rejection from the bar of a duly classified religious conscientious objector.

The most substantial question under this sub-head is, whether the religious beliefs of petitioner and the historic peace churches have any reasonable relation to unfitness to practice law and bad moral character.

Religious objections to war and fitness to be a lawyer.

We stress again the point that this brief is not concerned with unlawful acts impelled by religion. We are not considering here whether a Methodist conscientious objector who went to prison during the last war, when he had no statutory draft exemption, should be admitted to the bar. We leave entirely aside the effect of religious liberty upon an actual law breaker. Petitioner is in no such situation. His every act has been lawful.

Consequently, we submit that the judges of the Illinois Supreme Court are confronted with this dilemma: Either (1) they rejected petitioner because of his lawful acts and the legal status conferred upon him by Congress and federal officials; or (2) they rejected him because of his religious beliefs. There is no third possibility.

If the first alternative is the case, then the Supreme Court of Illinois has said, in effect: "You are unfit to be a lawyer simply because you have obeyed the law." The situation is then much the same as if that court had upheld a hypothetical Illinois statute imposing a heavy annual fine upon all citizens of Illinois who should be classified in IV-E.

Let us consider the second alternative, and assume that petitioner was rejected, not on account of his draft classification *per se*, but because of his religious beliefs which brought about that classification. The Justices in their Return take the position that they were justified in excluding a man for his mere beliefs because those beliefs might perhaps some day lead him to violate a possible state conscription statute.

This position that mere beliefs can be penalized so long as they arouse vague apprehensions of some remote danger to society is open to grave question in view of what Mr. Justice Roberts stated, on behalf of a unanimous Court, in *Cantwell v. Connecticut*, 310 U. S. 296, 303-304 (italics supplied):

> "Thus the Amendment embraces two concepts—freedom to believe and freedom to act. *The first is absolute*, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

Since petitioner's conduct in this case complied with every regulation by Congress, the interference was with his "freedom to believe", which this Court has declared to be "absolute".

We realize that this declaration of Mr. Justice Roberts should not be applied with a literal rigidity, for a few interferences with liberty for religious beliefs unaccompanied by acts have been judicially sanctioned under the First Amendment. The naturalization cases, to be considered later, are an example. Again, an alien religious anarchist or religious polygamist, who had been entirely law-abiding,

can be excluded from our shores or even deported after many years of residence in this country. *Lopez v. Howe*, 259 Fed. 401 (C. C. A. 2d), appeal dismissed, 254 U. S. 613. These are easily distinguishable from the case at bar because the control of Congress over immigration is extraordinarily wide and because the beliefs in question have been repeatedly and specifically stigmatized by Congress as dangerously liable to produce very objectionable acts in the great run of cases. There is no similar experience that religious conscientious objectors are dangerous to society; andd here Congress has expressly recognized just the opposite conclusion by using them for "work of national importance" during the emergency. Furthermore, these instances of legal disqualifications for beliefs are very rare and ought to be kept so. That some persons in authority may fear remote injuries to society from those beliefs is not a proper justification for suppressing them. Practically every religious persecution in history has been defended on the ground that the believers were prone to commit unlawful acts. English Roman Catholics might assassinate the King; Russian Jews might murder Christian children. Religious toleration cannot exist unless such fears are courageously ignored.

The distinction between beliefs and unlawful acts is very important despite occasional exceptions. Almost all the cases set forth in this brief as upholding restrictions on religious liberty involved acts or refusals to act.[17] Hence those cases furnish no support for the severe burden placed on religious beliefs in the case at bar.

Petitioner, who has obeyed the law, falls outside the reasons for permissible restrictions on religious liberty which were laid down by Mr. Justice Black and Mr. Justice

[17] The exceptions were the disqualification of atheists as witnesses, and of those conscientiously opposed to the death penalty as jurors in capital cases. Here only beliefs were involved. But the penalties were not comparable with exclusion from the bar.

Douglas, concurring in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 643:

> "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity."

Particularly appropriate in this case is the century-old declaration of Chief Justice Mellen of Maine in *Waite v. Merrill*, 4 *Greenl.* 102:

> "We must remember that in this land of liberty, civil and religious, conscience is subject to no human law; its rights are not to be invaded or even questioned, so long as its dictates are obeyed, consistently with the harmony, good order and peace of the community. With us modes of faith and worship must always be numerous and variant; and it is not the province of either branch of the government to control or restrain them, when they appear sincere and harmless."

The only real question in this part of the case is whether the petitioner's beliefs *now* unfit him for the practice of law. We shall now endeavor to examine this question in the light of plain common sense.

We recognize that some religious opinions might properly disqualify an applicant to the bar. For example, assume that he insisted that the only kind of binding law was that set forth in Leviticus and the other early books of the Old Testament, and asserted that he owed no respect to the man-made law of American legislatures and judges which he had mastered in law school. Obviously such a per-

son would be better fitted for a preacher in some literal sect than for a lawyer, and his rejection by the Committee on Character and Fitness might not be considered unreasonable despite his unblemished reputation. Furthermore, we concede that the particular religious beliefs of this petitioner might reasonably disqualify him for certain occupations. Unwillingness to bear arms may unfit a man to be a policeman or a guard on an armored pay-roll truck, because the unhesitating and efficient use of force is a possible incident of the job. But it is no part of a lawyer's duties to bear arms.

It may be argued that lawyers are subject to the Selective Service Act. So are plumbers and barbers and electricians. Yet nobody would think of conditioning licenses in these occupations upon the applicant's religious views about war. Liability to the draft applies to all citizens regardless of their trades or professions, except as they may be duly exempted. When a lawyer is conscripted into the army, he is no longer practicing law. We submit that petitioner's conscientious scruples about killing have no more to do with his actual fitness to advise clients or address juries or draw wills than with his fitness to install a baseboard light-socket.

As Macaulay says in his *Essay on the Civil Disabilities of the Jews:* "The points of difference between Christianity and Judaism . . . have no more to do with his fitness to be a magistrate, a legislator, or a minister of finance, than with his fitness to be a cobbler. Nobody has ever thought of compelling cobblers to make any declaration on the true faith of a Christian. . . . Men act thus, not because they are indifferent to religion, but because they do not see what religion has to do with the mending of shoes." *Works* (Trevelyan ed. 1866) Vol. V, p. 458.

Religious views on non-military use of force.

It may be suggested that conscientious objectors to war may extend their religious scruples to the use of force in

other connections; that law depends on force in the imposition of punishments, the levy of executions on judgments, and evictions; and that consequently these objectors are unfit to become part of the administration of justice. Since this point is not mentioned by the Justices in their Return, we do not know that it affected their action or the action of the Character Committee as a whole. Still, the letter received by the petitioner from Mr. Garman, the secretary of the Character Committee (R. 56-57), suggests that this was his chief reason for not giving petitioner a certificate. Mr. Garman says in part:

> "You eschew the use of force regardless of circumstances but the law which you profess to embrace and which you teach and would practice is not an abstraction observed through mutual respect. It is real. It is the result of experience of man in an imperfect world, necessary we believe to restrain the strong and protect the weak. It recognizes the right even of the individual to use force under certain circumstances and commands the use of force to obtain its observance.
>
> "Your conduct is governed by a higher law which we all hope may some day prevail. In the meantime most of us think chaos would prevail and civilization might be destroyed if the wolves are not kept at bay. Lawyers have the job of aiding in the administration and enforcement of the law,—all the law. What protection can the law be to the weak if lawyers do not consider its mandates to be entitled to obedience by force if necessary?
>
> ". . . My point is merely that your position seems inconsistent with the obligation of an attorney at law."

Inasmuch as the views expressed in this letter may conceivably be applied by this and other character committees to members of the historic peace churches who seek to become lawyers, we deem it important, as representatives of the American Friends Service Committee, to repudiate these views as unsound.

In the first place, we submit that this letter is not a satisfactory statement of petitioner's position as revealed by his replies to the Character Committee (S. R. 8, 11-13, 25, 30-33, 38, 41-42). We would summarize the testimony on his position as follows: His position is what is best known as religious pacifism. It is essentially like the historical Quaker position and is in accord with that of the Fellowship of Reconciliation. He feels that he cannot do either combatant or non-combatant military service because he believes that to be contrary to the teachings of Jesus. He would not do even non-combatant service under the military authorities, because he thinks that the whole military system is wrong. He could not use violence to protect himself or in defense of others. He does, however, believe in the use of a police force which acts as a restraining and corrective force and proceeds against individual wrongdoers. He does not believe in any force that requires the taking of human lives, and so is opposed to capital punishment. As a practitioner, he would not be willing to prosecute a murder case if he had to ask for the death penalty; but if appointed to defend somebody indicted for murder, he would defend him as the law provides and assert self-defense if relevant, even though he does not believe in using violence to defend himself. In settling disputes, he would advise a client as to his rights and try to get the parties to settle things without going to court, "just to get together as friends. . . ." He stated:

> "I think . . . I have something to offer . . . , because I believe in settling it peacefully and settling it on terms of friendship and understanding rather than going through court. If there is no other way to obtain justice, then that is what the courts are for, but it seems to me that the lawyer's main job or one of the main jobs is to try to get people to work things out peacefully. . . . Lawsuits do not bring love and brotherliness—they just create antagonism.

"Q. Would it be your effort to eliminate all litigation possible if you were admitted to the bar?

"A. All that it is possible to without sacrificing the client's interest. A man can not do that. I mean he is entrusted with that. Of course, a man can not play two sides of the fence. He can not act as attorney for both parties. I know that. And yet if there is an opportunity to get both lawyers together and the parties together and sit down and talk it over and settle it peacefully, he should do that." (S. R. 31.)

He would refuse to represent a client in a civil case if he believed that that side was unjust although the client was relying on his legal rights. If it was a criminal case, he would, of course, be bound to take it and get as much justice as he could, that is, protect all of his client's rights that he could. He would not be willing to take an eviction case if it would mean sending a man out in the street to freeze and starve. He would simply tell his client that his conscience would not let him do it and that the client would have to find some other lawyer who did not feel the same way. Finally, he is interested in legal reforms:

"I think there is work that needs to be done. A lot of prison reform that needs to be done. I think it is unchristian the kind of prisons we have. I think there are a lot of other things that perhaps the law has a place to do.

"I think the law has a place to see to it that every man has a chance to eat and a chance to live equally. I think the law has a place where people can go and get justice done for themselves without paying too much, for the bulk of the people that are too poor. I have been particularly interested in the legal clinics that have been set up in different places." (S. R. 30.)

We submit that nothing here is inconsistent with the obligation of an attorney at law. Petitioner is unwilling to take a civil case in which he does not believe, and the same

unwillingness is often attributed to Abraham Lincoln. He is anxious to settle cases out of court if possible, and so are most wise lawyers. We concede that petitioner's unwillingness to engage in certain kinds of litigation makes him fall short of Mr. Garman's standard that "lawyers have the job of aiding in the administration and enforcement of . . . all the law." What of it? Mr. Garman's standard is Herculean. We submit that no single lawyer aids in the administration of all the law, and that no applicant to the bar ever expects to do so. If a Roman Catholic, who is conscientiously opposed to divorce admits that he would never appear in a divorce case, then he cannot render complete legal services to his clients. Must he therefore be excluded from the practice of law? Even if petitioner is not eager to engage in contentious litigation, almost every practicing lawyer devotes a very large percentage of his time to keeping his clients out of court just as petitioner proposes to do. Many practitioners have not seen the inside of a courtroom for years.

The unreasonableness of the position that the petitioner is unfit for the bar becomes still more apparent when his testimony at the hearing is supplemented by his letter to Mr. Garman (R. 57-61) and the written testimony as to his character which was furnished (R. 61-72). He displays high ideals of the duties of a lawyer. Some may think that his distinction between the use of force by a soldier and by a policeman is not entirely logical, a possibility which he admits (R. 58, 60); this merely illustrates the statement of Judge Augustus Hand: "Religious belief . . . accepts the aid of logic but refuses to be limited by it." *United States v. Kauten*, 133 F. 2d 703, 708 (C. C. A. 2d.) Any person who has heard or read the testimony of a conscientious objector under a rigorous cross-examination will easily understand how hard it is for him to be entirely consistent in his explanations of the manner in which he adjusts his religious scruples to the exacting demands of ordinary life. This man's unusual fitness to be a lawyer is attested by

those who knew him intimately. His college and law school contemporaries, now in the army, speak of him in the highest terms. The dean of the law school where he studied writes (R. 62):

> ". . . that he has never observed anything in the opinions and conduct of the applicant that leads the affiant to believe that the applicant's adherence to his religious convictions is inconsistent with the highest qualifications associated with a lawyer in the practice of law. Finally, affiant alleges that it is his belief that the applicant has an unusually high sense of ethical values and that he believes the applicant's conduct in the practice of law would be governed throughout by exemplary ethical principles."

The dean of the law school where he teaches has already been quoted. (Supra pp. 5-6.) His pastor writes (R. 67):

> ". . . that Mr. Summers is one of the finest young men that it has been my privilege to know, and I have been in a position to know many. I have never failed to be impressed by his intellectual and moral honesty which he has maintained in every circumstance in which I have had the opportunity to observe him, often at the cost of what might have been regarded as his personal advantage. I have known but few to equal him in genuine social concern and unselfish devotion to the public good of any community of which he was a part."

This is the kind of young man whom a rule against religious objectors excludes from the bar. This is the man who is singled out for denial of his certificate of good character. The worst one can say against him is that he may be a bit too conscientious for the wear and tear of ordinary life, but the bar can well afford to have a few members with that fault.

Good Citizenship.

Probably the most persuasive argument against petitioner would consist of two propositions like this: (1) A good lawyer has an unusually high obligation to be a good citizen. (2) Willingness to bear arms is an essential of good citizenship. *Ergo*, a conscientious objector cannot be either a good citizen or a good lawyer.

We heartily accept the first proposition, but we dispute both the second proposition and the conclusion. Insofar as the alleged inability of a citizen with religious scruples against war to be a good citizen is based upon judicial decisions denying naturalization to aliens with similar beliefs, we postpone consideration of the application of those decisions to the different facts of the case at bar. For the moment we are concerned not with legal doctrines but facts. And we submit that the proposition that a conscientious objector is necessarily a bad citizen disregards all our history since colonial days.

The activity of Friends in law and public life in the colonies was not only in Pennsylvania, where the Quakers were in political control until 1756 and were members of the legislative assembly, judges, and lawyers, but also in Rhode Island, where for more than 100 years they had an important share in the direction of the affairs of the colony, and in North Carolina, where they were active in public affairs during the early history of the colony—(Rufus M. Jones, "The Quakers in the American Colonies," 171-212, 338-353, 475-494). While they largely withdrew from public life in the eighteenth century, there are today Quaker judges and a considerable number of Quaker lawyers in active practice.

Among prominent members of the Society of Friends connected with law and government in the early history of Pennsylvania, other than William Penn himself, may be mentioned: John Kinsey (1693-1750), lawyer, politician, and jurist; William Lewis (1751-1819), lawyer, judge; David Lloyd (1656-1731), Chief Justice of Pennsylvania;

Nicholas More, first Chief Justice of Pennsylvania; Nicholas Waln (1742-1813), Quaker preacher and lawyer.

Mr. Justice Holmes remarked: "I would suggest that the Quakers have done their share to make the country what it is." (Dissenting in *United States v. Schwimmer*, 279 U. S. 644, 654.)

We do not find in the facts of human life any indication of a reasonable relation between religious scruples against war and unfitness to be a lawyer.

We now turn away from facts to law, and consider whether there is some constitutional doctrine which confers upon the State of Illinois the power to exclude conscientious objectors from the bar regardless of their good character and their fitness in fact to practice law. The Illinois Supreme Court relies on two doctrines to support this thesis: (1) the analogy of the constitutional power of the national government to deny citizenship to religious objectors, recognized in the *Macintosh* case; (2) the power of the State to require attorneys to take an oath of allegiance to the state constitution.

We shall next discuss each of these doctrines in turn.

The Macintosh case.

In *United States v. Macintosh*, 283 U. S. 605, the District Court had denied citizenship to an alien who refused to declare his unqualified willingness to bear arms in war. The precise point decided by this Court was that Congress, by requiring an oath to support and defend the Constitution of the United States had impliedly made such willingness one of the statutory conditions of naturalization.[18] This result was reached by a majority of one. The dissenting opinion by Mr. Chief Justice Hughes was supported by the present Chief Justice and Justices Holmes and Brandeis.

[18] Two other decisions to the same effect were United States v. Schwimmer, 279 U. S. 644 (1929); United States v. Bland, 283 U. S. 636 (1931). These will be understood to be included in our discussion of the Macintosh case.

The authority of the *Macintosh* case does not seem strong today; the dissenting opinion appears to have been cited and quoted in the recent opinions of this Court much more often than the decision itself. See, for example, *Schneiderman v. United States*, 320 U. S. 118. For the reasons given in the brief filed in the *Macintosh* case by *amici curiae* on behalf of the American Friends Service Committee, which we now represent, we believe that this case was wrongly decided. Although it has not been overruled, we hope that this Court will not extend this decision beyond its precise facts. We submit that a precedent of such doubtful standing should not be freely expanded, and ought not to affect the very different situation of the citizen in the case at bar. We also venture to think that the opinion of Mr. Chief Justice Hughes has been accorded by this Court a much higher authority than belongs to dissenting opinions generally, so that we shall be justified in using extensively his views of oaths of allegiance when we discuss that subject.

The justices of the Illinois Supreme Court state that they are not relying upon the actual decision in the *Macintosh* case as to statutory interpretation, on which this Court was divided, but on the broader principle of the constitutional power to exclude religious objectors, which was accepted by both the majority and the minority. (R. 26-27.) Mr. Chief Justice Hughes said that "the authority of Congress to exact a promise to bear arms as a condition of its grant of naturalization . . ., for the present purpose, may . . . be assumed." We understand their position to be as follows: The Justices of the Supreme Court of Illinois have powers over membership in the state bar analogous to the powers of Congress over naturalization. In the case at bar, these Justices have determined that "the obligation of military service in time of war is absolute and cannot be conditioned upon the scruple of the citizen." (Return, p. 26.) Their action is comparable to "a provision enacted by Congress requiring absolute obedience, regardless of

conscientious objection, to military policy as a prerequisite to citizenship." (Id. p. 25.) In the *Macintosh* case, all the members of this Court agreed that religious liberty would not be violated by such an express denial of citizenship because of religious beliefs. Therefore, religious liberty is not violated by an express denial of the right to practice law because of similar beliefs.

Before questioning the soundness of this analogy between naturalization of aliens and admission of American citizens to the bar, we wish to observe that the Justices' description of the procedural situation is not quite correct. Their action in this case does not resemble a statute expressly excluding conscientious objectors from a privilege. Of course, the Supreme Court of Illinois has law-making powers over admission to the bar, but it exercised those powers when it promulgated Rule 58. (Supra p. 13.) This Rule contains no reference to conscientious objectors, nor does any state statute on the bar which is involved in this case. If Rule 58 had been amended so as to make willingness to bear arms a prerequisite to the practice of law, then indeed the procedural situation would be as contended. But the relevant provisions of Rule 58 remain unchanged. Consequently all the "legislation" in this case states only broad standards of character and fitness, which are somewhat like the broad standards in the Naturalization Act interpreted by a divided Court in the *Macintosh* case.

What was the real nature of the Justices' action in the case at bar? They affirmed the action of the Character Committee in a brief memorandum: this is not the way Rules of Court are amended. They were merely approving what the Character Committee had done under existing legislation. What then did the Character Committee do? It interpreted the general standards in Rule 58 to include a requirement of a willingness to bear arms regardless of religious beliefs, and thus impaired religious freedom. The Supreme Court of Illinois upheld this interpretation. Thus petitioner is excluded from the Illinois bar, not by legisla-

tion aimed at religious objectors, but by the judicial and administrative interpretation of legislation which says nothing about such objectors. Procedurally, the Character Committee and the Supreme Court of Illinois were doing exactly what the naturalization officials and the District Court did in the *Macintosh* case in a different substantive situation—they construed broad statutory standards of fitness in such a way as to interfere with religious liberty.

Therefore, the action is not comparable to a statute, as the Justices contend in their Return. In fact, the precise question before this Court is the same procedural issue as in the *Macintosh* case and in *Cantwell v. Connecticut*; thus the *Cantwell* case has some bearing on the present authority of the *Macintosh* case. This issue is the constitutionality of construing a broad standard so as to penalize religious liberty.

We do not wish to press this procedural point; most of our argument is designed to show the unconstitutionality of a statute or rule of court expressly excluding religious objectors from the bar. But we have thought it necessary to refute the contention of the Illinois Supreme Court that their action in this case is sanctioned by the unanimous agreement of this Court in *United States v. Macintosh*.

We now turn to the substantive problem as to the soundness of the suggested analogy between naturalization and admission to the bar. Even if the decision of the bare majority in the *Macintosh* case be still law, it was concerned with a very different subject matter than this case. American citizenship is perhaps the greatest privilege which Congress can confer. Consequently Congress possesses and ought to possess enormously wide powers in determining the tests of fitness for citizenship, for sharing every right of a native-born person except eligibility to the Presidency and Vice-Presidency. If the wrong kind of people are naturalized, mistakes can rarely be corrected no matter how undesirable the new citizen later shows himself to be. Fitness for the bar relates to one occupation,

to a much narrower range of activities and influences. If serious mistakes are made, they can be remedied through disbarment.

The suggestion is made that all the prerequisites for citizenship should also be prerequisites for the practice of law. Let us see where this would lead us. The Naturalization Statutes have long made discriminations of race and color, and Congress can constitutionally add others if it chooses. Suppose that Congress refused naturalization to Negroes from Africa. Should a state court thereby be constitutionally enabled to draw the same color line against native-born Negroes seeking to practice law?

The proposition we are contesting runs thus: Conscientious objections to war can keep an alien from becoming a citizen, therefore they can keep a citizen from becoming a lawyer. This seems to us a *non sequitur*. Much can be asked of an alien which is not required of a citizen. If an alien finds himself excluded from naturalization and other privileges here, he still remains a subject of his original country clothed with the full rights it confers. But a citizen cannot be anything else than a citizen while he lives in the United States. If he is denied a valuable privilege like the practice of law, for religious reasons, he will have to live on with a degraded status. Surely, this country has never contemplated the existence of a large group of "second-class citizens" who have done no criminal act and who are put on this low level because of their religion.

Finally, it is argued (Return, p. 26) that, since a lawyer must necessarily be a citizen, a native-born prospective lawyer must therefore fulfill all the prerequisites of naturalization including willingness to bear arms. By this argument, a Quaker should be disqualified for *every* occupation and office which is open only to citizens. He will be excluded, not only from the bar, but from the practice of medicine, election to legislatures and other public offices, all civil service positions, teaching in the public schools and many state universities, and employment in

factories and shipyards engaged on government contracts. He will be subjected to far more disabilities than the English Jews who aroused Macaulay's sympathetic eloquence, although he will still be a little better off than the Roman Catholics in Ireland in the eighteenth century.

We submit that it would be better to confine the naturalization cases to naturalization.

The attorney's oath of admission.

The Justices of the Illinois Supreme Court do not appear to deny what the Record clearly demonstrates, that petitioner, if once admitted to the bar, would do the work of a lawyer faithfully and well. They assert, however, that he is unable to perform the very first act required of an Illinois attorney, namely, taking the oath of admission. This is the only justification advanced by them for their action, in their Return to the Rule to Show Cause. They say (Return, p. 6):

> ". . . if it be further supposed that the sole ground for refusing the petitioner admission to practice as an officer of the court was his profession of conscientious objection to military service, nevertheless such refusal could not be deemed arbitrary or unreasonable because all applicants for admission to the Illinois bar are required to take an oath . . . ; and the petitioner could not take such an oath in good faith . . ."

The statutory oath required of an attorney in Illinois is substantially in the following form:

> "I do solemnly swear (or affirm . . .), that I will *support* the Constitution of the United States and the Constitution of the State of Illinois, and that I will *faithfully discharge the duties of the office of attorney and counsellor at law to the best of my ability.*" (Italics supplied.) 2 Jones Ill. Stat. § 9.04.

This oath contains no express promise to bear arms, and we do not see how such a promise can reasonably be implied from the wording. The promise to "support the Constitution" is much less indicative of armed combat than the naturalization oath involved in the *Macintosh* case, to "*support and defend* the Constitution and laws of the United States of America against all enemies, foreign and domestic . . ." (Italics supplied.) 8 U. S. C. § 735. The majority of this Court in the *Macintosh* case appear to have been considerably influenced in their decision by the presence of such words as "defend" and "enemies" in the promise, and to have regarded the alien's unwillingness to bear arms as a qualification of this statutory oath (283 U. S. 605, 618, 626). On the other hand, Mr. Chief Justice Hughes thought that even these words did not exclude a conscientious objector; that they could and should be interpreted so as not to impair religious beliefs. *A fortiori* the word "support" by itself does not imply willingness to bear arms and should not be interpreted to impose a civil disability upon petitioner.

Furthermore, the Illinois oath is an oath of office. The first portion should be construed in relation to its concluding promise to perform the duties of a lawyer. The "support" of the Constitution which is pledged is what is due from a good and honorable attorney at law. Mr. Chief Justice Hughes pointed out that such a view has always been taken of the oath required by Act of Congress from civil officers generally. (See 5 U. S. C. § 16.) Even though the federal oath of office contains the same promise to "defend the Constitution . . . against all enemies" as the naturalization oath, these general words have not been regarded as implying a promise by civil officers, "to bear arms notwithstanding religious or conscientious scruples or as requiring one to promise to put allegiance to temporal power above what is sincerely believed to be one's duty of obedience to God." He continued (283 U. S. at 630-632):

"It goes without saying that it was not the intention of the Congress in framing the oath to impose any religious test. When we consider the history of the struggle for religious liberty, the large number of citizens of our country, from the very beginning, who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God, I find it impossible to conclude that such persons are to be deemed disqualified for public office in this country because of the requirement of the oath which must be taken before they enter upon their duties. The terms of the promise 'to support and defend the Constitution of the United States against all enemies, foreign and domestic,' are not, I think, to be read as demanding any such result. There are other and most important methods of defense, even in time of war, apart from the personal bearing of arms. We have but to consider the defense given to our country in the late war, both in industry and in the field, by workers of all sorts, by engineers, nurses, doctors and chaplains, to realize that there is opportunity even at such a time for essential service in the activities of defense which do not require the overriding of such religious scruples. I think that the requirement of the oath of office should be read in the light of our regard from the beginning for freedom of conscience. While it has always been recognized that the supreme power of government may be exerted and disobedience to its commands may be punished, we know that with many of our worthy citizens it would be a most heart-searching question if they were asked whether they would promise to obey a law believed to be in conflict with religious duty. Many of their most honored exemplars in the past have been willing to suffer imprisonment or even death rather than to make such a promise. And we

also know, in particular, that a promise to engage in war by bearing arms, or thus to engage in a war believed to be unjust, would be contrary to the tenets of religious groups among our citizens who are of patriotic purpose and exemplary conduct. To conclude that the general oath of office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of the Congress but as repugnant to the fundamental principle of representative government."

Although this language is in a dissenting opinion, we believe that it should be accepted as an authoritative statement that conscientious objectors to war are qualified to hold a federal civil office and to take the requisite oath. It is true that the majority opinion in the *Macintosh* case did not expressly concede this point. Mr. Justice Sutherland did not mention it, but he dwelt throughout his opinion upon the purpose of the naturalization oath and the undesirability of admitting aliens to citizenship unless they were willing to agree in advance to fight for their new country. We find no passage in his opinion indicating that native-born citizens should be denied the privilege of holding office for unwillingness to bear arms. So far as we can ascertain, the actual administration of the federal oath for civil office holders has always accorded with the passage quoted from Mr. Chief Justice Hughes. The latest example of this practice is a ruling of the Civil Service Commission in 1941, that the classification of a person by his draft board as a conscientious objector "is not a bar to his reinstatement or employment in the Federal service"; and that his duly approved claim of conscientious objection does not indicate such "mental reservation or purpose of evasion" as would make his taking the statutory oath of civil office an invalid act. (Departmental Circular No. 286—Nov. 8, 1941.)

If a person of petitioner's beliefs is able honestly to take this federal oath, he seems still more able to take the milder Illinois oath, which uses only the word "support". The Justices, however, insist on a much more drastic interpretation of the words "support . . . the Constitution of the State of Illinois . . ." They assert (Return, pp. 6-7) that petitioner could not take such an oath in good faith because a particular portion of this constitution authorizes the legislature to require compulsory military service in the militia from him under certain conditions, whereas the petitioner has not made any showing that he would render this service if it were required notwithstanding his conscientious objections.[19]

We make several replies to this contention. First, it rests on the fundamental assumption that one cannot honestly promise to support a constitution unless he is willing to pledge himself in advance to obey every single statute which may be enacted at any time in the future under any legislative power conferred by that constitution. This is a tremendous leap in the dark, especially as the Illinois oath exacts only support for "the Constitution of the State of Illinois" and not for its statutes. The broader federal oath of office to "support and defend the Constitution *and*

[19] A similar argument is made about the promise to "support" the Constitution of the United States, namely, that he does not aver willingness to obey some future selective service act omitting the recognition now given his religious beliefs by § 5 (g). We do not discuss this contention, because the scope of the oath of allegiance to the United States Constitution on the part of a state office holder or attorney should, we submit, be governed by federal decisions and practice. This portion of the oath seems intended to comply with Article VI of the United States Constitution requiring that "all . . . judicial officers, . . . of the several States, shall be bound by oath or affirmation to support this Constitution;" and so the scope of such a constitutional oath is a federal and not a state question. Its scope appears to be settled by the federal practice as described by Mr. Chief Justice Hughes in the Macintosh case.

laws" has never been so construed. This assumption of the Justices will have some extraordinary consequences if it be applied to every clause of the Illinois Constitution. Certainly there is no reason for limiting it to the militia clause except a dislike for conscientious objectors. Article IV, section 6 of the Illinois Constitution requires the General Assembly to "apportion the State every ten years." There has been no reapportionment since 1901. (See *Fergus v. Kinney*, 333 Ill. 437, 164 N. E. 665.) Therefore; members of the General Assembly have for several decades disregarded this provision of the state constitution. According to the reasoning of the Justices they are disqualified from reelection to the General Assembly or from holding any civil office in Illinois, inasmuch as they cannot take "in good faith" (Return, p. 6) the required constitutional oath "to support the Constitution of the State of Illinois." (Ill. Const. Art. IV, § 5.) Take one more example, Article IX, section 1, of the state constitution directs the general Assembly to provide revenue by levying a tax so that every person shall pay "in proportion to the value of his property"; and section 9 requires municipal taxes to be "uniform in respect to persons and property". An oath of any attorney or office holder, as the word "support" is construed by the Justices of the Illinois Supreme Court, requires intention to obey any statute enacted under these clauses of the constitution. Such a statute provides that real property shall be valued "at its fair cash value, estimated at the price it would bring at a fair, voluntary sale", and that personal property shall be similarly valued except stock in domestic corporations. Any assessor who knowingly values property below this standard is thereby disqualified to hold office in Illinois, and the taxpayer who cooperates in the under-valuation or who expects so to cooperate in the future would seem unable to take an oath for any public office in Illinois. If a very remote possibility of disobedience to a non-existent statute under the militia clause of the state constitution is sufficient to disqualify pe-

titioner, then actual or highly probable violations of the apportionment clause or the tax clause and tax statutes should equally disqualify other persons from holding office or being admitted to the bar. There is nothing in the attorney's oath which specifically directs it toward the militia clause of the state constitution. No such impossibly high standard is imposed on applicants for admission to the bar generally or on the holders of public office in Illinois. We submit that the imposition of this standard on petitioner alone is both arbitrary and a plain penalty upon his religious beliefs.

Secondly, the alleged violation of the militia provisions of the state constitution is so improbable that it cannot be reasonably regarded as negating petitioner's honesty in swearing to support that constitution. The provisions on which the Justices rely are:

> "The militia of the state of Illinois shall consist of all able-bodied male persons resident in the state, between the ages of eighteen and forty-five, except such persons as now are, or hereafter may be, *exempted by the laws of the United States*, or of this state." (Italics supplied.) *Illinois Const. Art XII § 1.*
>
> "No person having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace: Provided, such person shall pay an equivalent for such exemption." *Ibid § 6.*

Petitioner cannot *now* possibly disobey this part of the Illinois Constitution for many reasons. It merely authorizes a statute and the Illinois legislature has not compelled service in the militia since 1864. Petitioner's religious beliefs prevent his conscription in the militia in time of peace. He cannot be compelled to serve during this war because he is "exempted by the laws of the United States" an express exception in the state constitution, and also because he is subject to the orders of his draft board. Even if another war should occur and he is not then older than forty-

five, he cannot be forced into the militia unless Congress refuses to reenact section 5 (g) of the Selective Service Act and unless the imaginary Illinois statute also fails to exempt religious objectors. Finally, it is far from certain that every lawyer of military age not in federal service will be drafted into the militia, and petitioner may not be asked to serve.

Thus petitioner's alleged inability to swear in good faith to support the Illinois Constitution rests on a very peculiar process of reasoning. First, the Justices single out a few clauses which have lain idle for many years, which have no more connection with the duties of a lawyer than with those of a doctor, but which are known to create peculiar difficulties for a man with petitioner's religious beliefs. Then they supplement these constitutional clauses with a number of conditions contrary to fact and assume that petitioner is asked to answer the following hypothetical question:

"(1) *If* there should be another war, and

(2) *if* Congress did not then classify conscientious objectors as it does now, and

(3) *if* you were not called into some federal service, and

(4) *if* the Illinois legislature should for the first time in about a century pass a statute compelling citizens to serve in the militia, and

(5) *if* this statute did not exempt men of your beliefs, and

(6) *if* you still held the same beliefs, and

(7) *if* you were not then older than forty-five, and

(8) *if* you were then "able-bodied", and

(9) *if* your name were drawn for service in the Illinois militia, and

(10) *if* the state draft board assigned you to some active duty, and

(11) *if* this duty involved work contrary to your religious beliefs,

we ask you, Mr. Summers, would you obey?"

Finally, although the Character Committee put no such question or indeed any question relating to the militia, the Justices infer that if he had been asked it, he would have answered "No". And against this imaginary "No", the character testimony of his teachers and officers and friends in the armed forces counts for absolutely nothing.

When the broad phrase "support . . . the Constitution" in a statute designed to meet a wholly laudable purpose is stretched like this as the chief justification for a serious impairment of religious liberty, we submit that the Justices' interpretation of the attorney's oath falls within the principle of *Cantwell v. Connecticut*, 310 U. S. 296, 309, as much as their interpretation of such broad phrases as "character and moral fitness" in the Rule of Court. The Justices of the Illinois Supreme Court are suppressing religious views "under the guise of conserving desirable conditions."

In *Herndon v. Lowry*, 301 U. S. 242, 255, 261-264, Mr. Justice Roberts condemned the construction of a statute which was so loose as not to furnish a sufficiently ascertainable standard of wrongful conduct and so broad as to include activities which created no "clear and present danger" of obstruction of a particular state function. In that case liberty of speech was limited and not liberty of religion, but much of his language applies *mutatis mutandis* to the case at bar. He said (pp. 263-264):

> "The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the bounda-

ries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment."

The Illinois attorney's oath is intended to assert the applicant's devotion to his duties as a member of the bar. We submit that it cannot be used to penalize religious beliefs which do not impair his performance of those duties, unless perhaps his beliefs are generally reprobated (as polygamy is). No strong public need is shown for denying the privilege of practicing law to petitioner and those who share his beliefs on the ground that these beliefs might many years hence under very unlikely conditions produce disobedience of a non-existent law which has no connection with their ability to use their legal knowledge and judgment on behalf of their clients or with their fidelity to clients and to the courts before whom they will appear. Where no clear and present danger threatens civil disabilities for religious reasons are unconstitutional; and it makes no difference whether they are imposed by flat prohibitions against members of a particular faith or by the subtler device of a test-oath which, either in terms or by authoritative interpretation, is repugnant to the tenets of that faith. If a rule of court expressly excluding duly qualified religious objectors from the bar be invalid, as we contend, then it is equally wrong to require lawyers to qualify themselves by an oath explicitly promising to bear arms. It is even worse for a state court to read such a promise into an oath which on its face pledges the taker to perform faithfully the duties of his office and profession.

This brings us to our last argument against the use of the statutory oath to keep out of the bar persons who hold an unpopular religious belief. To do so turns an entirely proper oath into a test oath, and test oaths are abhorrent to our law. As already shown, they were a favorite device for imposing civil disabilities on Roman Catholics and Dissenters and Jews in England and Ireland when our

Constitution was adopted. They have been repeatedly condemned by members of this Court.

Mr. Chief Justice Hughes said in *United States v. Macintosh*, 283 U. S. 605, 634-635:

> "One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. . . . And . . . freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts."

This language was in a dissenting opinion, but the same principle was enunciated by seven members of this Court in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. Mr. Justice Jackson for the Court said (pp. 631, 633):

> "Here . . . we are dealing with a compulsion . . . to declare a belief. . . . It is now a commonplace that censorship or suppression of expression of opinion is

tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. . . ."

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Mr. Justice Black and Mr. Justice Douglas, concurring, said (p. 644):

"Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States.

"Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men."

Mr. Justice Murphy, concurring, said (pp. 645-646):

"The right of freedom of thought and of religion as guaranteed by the Constitution against State action

> includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence in court. . . . Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the 'severest contests in which I have ever been engaged.' "

Mr. Justice Frankfurter, although differing from these Justices as to the result of the particular case, agreed with them as to the principle now in question. He spoke (p. 663) of "the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs."

This Court has held that "liberty" of religion is protected by the Fourteenth Amendment against restrictions by the states which are forbidden to Congress. Thus far the decisions have read only the provisions of the First Amendment into religious freedom as thus safeguarded. We venture to think that the Fourteenth Amendment may also prevent the states from using an infringement on religious liberty which is forbidden to Congress by a different part of the Constitution, namely, the last clause of Article VI: "but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." This clause invalidates test oaths for federal officers. We submit that it is just as important for religious freedom that test oaths should be outlawed for state officers. Perhaps the broad language of the First Amendment suffices for such a purpose. If not, the more specific provisions of Article VI may be available. This aspect of religious liberty was thought to be so important by the Philadelphia Convention that it was the only safeguard against persecution which they inserted into the Constitution itself. Therefore, we submit that it should not be

ignored when "liberty" of religion in the Fourteenth Amendment is invoked against state action.

National Defense.

The only public needs which could conceivably be served by the exclusion of a religious objector from the bar are the efficient administration of justice and national defense (including the protection of the State of Illinois from national enemies). Both are recognized as important purposes of government, but it is incumbent upon the Supreme Court of Illinois to convince this Court that either purpose is directly served by the denial of religious liberty. We have devoted much of our brief to showing that there is no close relation between fitness for the administration of justice and willingness to bear arms.

National defense does, of course, have a close connection with willingness to bear arms, but we fail to see its connection with the Justices' action in this case. Perhaps they think that the nation would be better defended in this war if petitioner were forced to serve in the army, but that matter is in other hands than theirs. It has been settled by Congress in section 5 (g) of the Selective Service Act and by his draft board. We can see how, in fact, petitioner's exclusion may tempt a few other religious objectors to forego their beliefs and be classified in I-A; but we are sure that the Justices of the Illinois Supreme Court will not advance such a justification for their action. Besides conflicting with the spirit, if not the letter, of the Congressional prohibition of bounties "to induce any person to . . . be inducted into the land or naval forces of the United States," (50 U. S. C. App. § 307) it would be a flagrant illustration of what Jefferson condemned in the Statute of Religious Toleration, bribing a man with worldly honors to change churches "by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion."

National defense in a possible future war is somewhat involved in the Justices' argument about the attorney's oath. Our reply has shown that their action in the case at bar has a very conjectural tendency to promote this supposed future need. When an inroad on religious liberty is urged for such a reason, we would point out, as the present Chief Justice declared in his dissenting opinion in the *Gobitis* case that there are "ways enough to secure the legitimate state end without infringing the asserted immunity." At least, there should be a positive determination by Congress of a pressing need for drafting religious objectors into military service before this Court gives weight to such a justification of civil disabilities on a particular faith. Congress has taken quite a different position in section 5 (g) of the 1940 Act. We submit that this Court should reject any suggestion that the best way to save the country in a future war is to sacrifice religious freedom during this war.

Hamilton v. Regents.

If *Hamilton v. Regents of the University of California*, 293 U. S. 245, be cited by the Supreme Court of Illinois we submit that it is not applicable to the facts now before this Court. Congress in 1862 had donated public lands to the States for the maintenance of colleges which should include military tactics in their teaching. This Act was long interpreted, perhaps erroneously,[29] to obligate the land-grant colleges to make military training a compulsory subject. The California legislature in 1868 established a state university, and expressly imposed such instruction in military tactics on all able-bodied male students in such manner as the Regents should prescribe. The Regents ordered all such students to take military training.

[29] The Attorney General, shortly before the decision, ruled that the Morrill Act did not require military training to be compulsory.

Participation in this training was contrary to the religious scruples of several Methodist students with beliefs resembling petitioner's. Their request for exemption was denied. This Court unanimously held that they were not constitutionally entitled to avoid the military courses, under the due process clause. If they sought the education offered cheaply by the State, they must take it on the State's terms. If they wished to preserve their religious beliefs inviolate, they must study elsewhere.

As representatives of the American Friends Service Committee, we regret that the Regents did not make some concessions to religious scruples, with legislative sanction if necessary, in order not to drive out of the university members of the historic peace churches and others sharing their opposition to war. We believe that a society of scholars, even more than an ordinary community, gains from the policy advocated by Mr. Justice Jackson:

> "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." (319 U. S. 624, 641-642.)

In comparison with such an ideal, the exemption of a few students who would leave rather than take military training, seems a small matter. But these are considerations of wisdom, on which this Court was not free to pass.

In the *Hamilton* case religious liberty did squarely collide with the public interest in national military defense. General military training in the university did directly serve national military defense, whereas merely excluding a man from the bar has the barest relation to it. The desirability of widespread instruction in military tactics was declared by a long series of carefully considered legislative acts, by Congress and in California; no statute recognizes the need for the Justices' action. The California students were trying to upset the practice of seventy years in scores of land-grant colleges; old process is likely to be

due process. Also compulsory service in the militia had long been recognized. By contrast, petitioner has faithfully complied with the existing law and complains of an unprecedented ruling. The students were trying to get an education at the State's expense, but on their own unusual terms. Petitioner is asking for nothing except the opportunity to practice law on the usual terms. Finally, the students were not forced into willingness to bear arms; they had an option. They could preserve their religious convictions by beginning at another college in California or shifting to it after the denial of exemption; despite the greater expense they might somehow hope to enter their chosen careers. Petitioner has had no option. He had to go before *this* Character Committee and the highest court of his State. True, he might move to another State and trust that its bar will not be closed to religious objectors. How can he be certain? To adopt the language of Mr. Justice Douglas, speaking for this Court, conscientious objectors "moving from state to state would feel immediately the cumulative effect of such [rulings] as they become fashionable. The way of the religious dissenter has long been hard. But if the formula of this type . . . is approved, a new device for the suppression of religious minorities will have been found." (*Murdock v. Pennsylvania*, 319 U. S. 105, 115.) Let us hope that there will still be a few liberal havens which will admit such men to pursue their profession, but religious freedom in the United States should surely mean more than the existence of some Holland or Geneva here and there among the forty-eight States. The possibility of exile is a poor remedy for persecution.

4. Petitioner has been denied the equal protection of the laws.

This clause of the Fourteenth Amendment requires that a classification should be reasonable. When a state treats different persons differently, the distinction must

have a sensible basis. This is not likely to be true when persons are put into an unfavored class because of their religious beliefs. Thus the due process clause and the equal protection clause overlap in the case at bar. Other applicants of moral fitness are admitted to practice law, but petitioner despite his moral fitness is rejected because of his draft status and the religious convictions which led to that status. The lack of any connection between these facts and his performance of his duties as a lawyer makes the refusal to admit him to the bar an arbitrary denial of religious liberty and also a classification without any reasonable basis.

Such an overlapping of the two clauses of the Fourteenth Amendment is likely to occur. Mr. Justice Lamar said in *Smith v. Texas*, 233 U. S. 630, 636:

> "Life, liberty, property and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords to those who are permitted to work."

The Supreme Court of Illinois contends that the privilege of practicing law is not a "liberty" within the Fourteenth Amendment (Return to Rule to Show Cause, p. 23). We consider this contention unsound because the legal profession must be grouped with other professions where the reasonableness of the licensing power is concerned. Still, even if the practice of law be considered as altogether a public office and not at all an occupation, as asserted on the Return, that does not affect the questions of "liberty" of religion and equal protection of the laws. For example, if one of our states should adopt a constitution forbidding its highest judge to be a Roman Catholic, as is done in

England by Act of Parliament,[21] such a discriminatory provision in the United States of America would seem invalid under the Fourteenth Amendment. Although the opportunity to hold a political office is not in itself "liberty or property" within the due process clause, *Snowden v. Hughes*, 321 U. S. 1; *Taylor v. Beckham*, 178 U. S. 548, 573-578, the exclusion of members of one particular faith from that opportunity would probably be considered to deny "liberty" of religion under the same clause. Also the classification on religious grounds would seem to deny to Roman Catholics "the equal protection of the laws."

This Court has applied the equal protection clause to political rights in at least two cases. In *Nixon v. Herndon*, 273 U. S. 536, and *Nixon v. Condon*, 286 U. S. 73, this clause was held to be violated because a classification of voters for public officers was based on color. The classification of persons eligible for office according to color seems equally objectionable. The same unreasonableness extends in principle to the case at bar, where eligibility to become an officer of the court is made to depend on religious beliefs. It is true that this Court has not hitherto reviewed a classification according to religion under the equal protection clause, but a New Jersey court has done so. (See *Morgan v. Civil Service Commission*, 131 N. J. L. 411, 414-415.)

We find an important analogy to the case at bar in *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, where this Court held it a denial of equal protection of the laws for a state to exclude a person from a state law school because he was a Negro without providing other law schools of comparable standards for Negroes. When this clause protects the right of the member of a minority group to prepare himself for the bar, we submit that it should also assure his admission to the bar of his state if he meets all the proper qualifications. It would indeed be a barren victory if the Constitution merely enables a man to fit himself to become a lawyer and then permits the state to deny him the opportunity to use the legal knowledge which he

[21] 10 Geo. 4, c. 7, § 12 (1829) (the Lord Chancellor).

has acquired. Equality in admission to the bar is just as important as equality in admission to a state law school. The two naturally belong together. And discrimination against an applicant to the bar because of his religion is as bad as discrimination against him because of his color.

Conclusion as to the unconstitutional infringement of religious freedom.

The civil disability imposed upon petitioner because of his religion and his consequent draft status denies to the petitioner liberty of religion without any reasonable relation to any strong public interest and denies him equal protection of the laws. It is true that as yet only one civil disability has been imposed by the State of Illinois upon petitioner and presumably upon men of his religious beliefs. The consequences of even this single disability are far reaching. If he cannot be a lawyer, he cannot be a judge or occupy many important public offices and private positions which are open only to members of the bar. He is deprived of the practical opportunity which the bar offers as a gateway to public office. Other religious objectors who are already lawyers will perhaps be disbarred on the ground that they are morally unfit to remain in the profession or that they obtained admission under false pretenses and by false swearing. The same reasons which are alleged to make petitioner a bad citizen would also make them bad citizens.

What is still more serious, the reasons which the Justices urge in support of their action would apply equally well to the exclusion of religious objectors from many other offices and occupations. If this Court should give its sanction to the argument that men of this faith are bad citizens and unfit to engage in the administration of justice or to the argument that penalizing such men somehow promotes national defense, these same arguments may easily be used to close door after door to religious objectors. State legislatures may be persuaded that these men ought not to become legislators and participate in the framing of laws

which they are unfit to administer; that they are ineligible as governors, who head state militias; that they ought not to be doctors, because doctors are called into the army much more often than lawyers; that they should not be officers or employees in any corporation which might conceivably be needed for war work; and that as bad citizens they must not be allowed to teach in public schools or state universities. Already a man with petitioner's religious beliefs has been dismissed from his position in a public school in Florida after ten years of service as unfit to teach science. (*State ex rel. Schweitzer v. Turner*, 19 So. 2d 839.) This Florida case forcibly demonstrates the possible spread of civil disabilities in the United States. We submit that the proper time to stop this religious intolerance is now. As this Court declared through Mr. Justice Jackson in the *Barnette* case:

> "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." (319 U. S. 624, 641.)

II.

Is the exclusion from the state bar of a duly classified conscientious objector, who has been assigned by his draft board to "work of national importance under civilian direction," an invalid interference with the purpose of Congress as embodied in the Selective Service Act of 1940?

Our argument under this second main heading is based, not on the Fourteenth Amendment, but on the provisions of section 5 (g) of the Selective Service Act of 1940, which (by Article VI of the Constitution) is "the supreme law of the land" and binding on state judges in Illinois.

The essence of this argument is that the Supreme Court of Illinois, by imposing a heavy civil disability on petitioner because of his being a duly classified religious conscientious objector, has seriously interfered with the successful opera-

tion of a carefully planned Congressional scheme for solving an important and difficult national problem.

Briefly stated, our position is this: the proper relationship between religious conscientious objectors and other citizens in time of war involves a reconciliation between national defense and religious freedom. Both are national interests of the highest importance. The preservation of religious freedom was the main purpose of many men in coming to our shores. The historic peace churches had an honorable share in the settlement and life of this country. Our lawgivers, ever mindful of these facts, have given frequent attention to this problem, and there has been throughout our history a widespread reluctance to interfere with conscience for the sake of defense. The desire to work out a wise adjustment of these conflicting interests was realized locally at an early date by the militia laws of many states; but although the same desire was displayed in debates in the First Congress, a federal solution was long sought in vain. The successive conscription acts from 1812 to 1917 showed progress toward a national policy, but the actual operation of Selective Service in the last war was unsatisfactory—a fact repeatedly called to the attention of the Congressional Committees during hearings on the present law.

In the Selective Service Act of 1940, Congress took a great deal of care in working out a solution of this difficult problem. The history of the conscientious objector clause in committee is very impressive. Two aspects of the problem were brought out by abundant testimony: First, the need of giving a wider scope to religious freedom by recognizing the beliefs of individuals like petitioner outside the historic peace churches. Second, the desirability of making affirmative use of religious objectors in the service of their country. The Committees were shown that most of these men have a strong sense of obligation to work for the public good and so constitute a valuable element in the nation whose potentialities might be utilized in civilian activities instead of being ignored, or wasted in clashes with mili-

tary discipline. The Committees had before them a careful statement of the English experience in drawing conscientious objectors into the national life in a crisis by assigning them to many essential jobs which did not conflict with their beliefs. While the English system was unfortunately not adopted, a conscientious objector clause was drafted in consultation with representatives of the War Department and laid before the Committee. This clause substantially became part of the bill as reported to the two Houses and with some changes in machinery was enacted as Section 5 (g) of the Selective Training and Service Act of 1940, the pertinent provisions of which are as follows:

> "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction." (54 Stat. 887, 50 U. S. C. App. § 305 (g).)

In this section Congress establishes a comprehensive scheme for the solution of "the not easy problem of the conscientious objector." It gives a greater protection for individual beliefs than any previous Act, but its most significant feature is its recognition of conscientious objectors as directly useful to the nation. They are not merely kept out of the armed services and cast aside like lunatics or criminals. They remain part of the great group of young men engaged in national service under the Act. Section 5

(g) refers to three types of national service: (1) combatant training and service; (2) non-combatant service; (3) work of national importance under civilian direction. A drafted man is to be assigned by his board to either of these three kinds of service according to his religious beliefs. The men assigned to group (3) are as much part of the Selective Service System as those in the armed forces. Thus the comprehensive scheme of Congress not only preserves religious freedom, but also brings into the service of the nation a large number of sincere and able young men capable of performing important tasks. It gears conscientious objectors into the national life. It promotes national unity in war and in peace by avoiding the bitter resentments inevitably aroused by intolerance, and by enlisting the wide religious and intellectual diversities of our citizens in the complex enterprise of promoting the national welfare. Congress has recognized the truth long asserted by the Religious Society of Friends that military service is not the only way in which a man can devote his life to his country.

The Justices' action in the case at bar breaks into this carefully planned solution of the difficult problem of reconciling religious freedom with national defense. They are penalizing a man for performing one of the three types of national service set up by Congress. Petitioner's religious beliefs are evaluated by Congress as fitting him for "work of national importance;" and by the Justices as conclusive evidence of moral unfitness. In this conflict the determination of Congress must be supreme. The real issue of fact on which the Supreme Court of Illinois has passed is the worth of a conscientious objector as a citizen. Since the appraisal of his worth concerns national defense and religious freedom, it belongs to Congress and Congress has spoken. Congress has handled the matter by a comprehensive scheme.

We submit that this Court should not permit the Supreme Court of Illinois to interfere with the operation of

the Congressional scheme or to substitute its judgment of petitioner's value as a citizen for the judgment of Congress.

We call attention to the magnitude of the national concern for defense and religious freedom embodied in the congressional regulation of religious objectors. It is inconsistent with the will of Congress for a state to penalize petitioner for lawful conduct in compliance with such regulation. His religious beliefs, which have been singled out by Congress for special provision and treatment, cannot properly be regarded by a state court as evidence of bad character.

We do not wish to burden this Court with details of the hearings before the House and Senate Committees on Military Affairs during the consideration of the Selective Service Bill of 1940, but if there be doubt as to our contention that, in making their drastic revision of the original Burke-Wadsworth Bill (S. 4164 and H. R. 10132), these Committees were vitally concerned with religious freedom as well as with military victory, we hope that this Court will review the reports (76th Congress, 3rd Session, House Reports Nos. 2903, 2937, 2947) and the testimony in regard to the problem of the conscientious objectors, particularly that of Dr. Harry Emerson Fosdick, Professor Beale, and Raymond Wilson (Senate Hearings, pp. 308-324; House Hearings pp. 184-193, 204-211, 323-344).

In holding that the Federal Alien Registration Act of 1940 invalidated a prior state act covering the same subject, Mr. Justice Black, speaking for this Court, said:

> "Where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."

Hines v. Davidowitz, 312 U. S. 52, 66-67.
See also *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148;
Terral v. Burke Construction Co., 257 U. S. 529.

We submit that the same reasoning applies in the case at bar and that the Selective Service Act of 1940 prevents a state from refusing to admit to its bar a fully qualified citizen merely because he has been classified as a conscientious objector in Class IV-E.

Conclusion.

We therefore submit that:

(1) the religious freedom of petitioner has been unconstitutionally infringed by the rejection of his application for admission to the bar solely because he is a conscientious objector to war on religious grounds, and

(2) the exclusion of petitioner from the bar of Illinois under these circumstances constitutes an invalid interference with the purpose of Congress as embodied in the Selective Training and Service Act of 1940.

Respectfully submitted,

ZECHARIAH CHAFEE, JR.
(of the Rhode Island Bar)
HAROLD EVANS
(of the Pennsylvania Bar)
Counsel for The American Friends Service Committee.

ERNEST ANGELL
(of the New York Bar)
WILLIAM DRAPER LEWIS
CLAUDE C. SMITH
THOMAS RAEBURN WHITE
(of the Pennsylvania Bar)
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 205.—October Term, 1944.

In re Clyde Wilson Summers, Petitioner. } On Writ of Certiorari to the Supreme Court of the State of Illinois.

[June 11, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

Petitioner sought a writ of certiorari from this Court under Section 237(b) of the Judicial Code to review the action of the Supreme Court of Illinois in denying petitioner's prayer for admission to the practice of law in that state. It was alleged that the denial was "on the sole ground that he is a conscientious objector to war" or to phrase petitioner's contention slightly differently "because of his conscientous scruples against participation in war." Petitioner challenges here the right of the Supreme Court to exclude him from the bar under the due process clause of the Fourteenth Amendment to the Constitution of the United States which secured to him protection against state action in violation of the principles of the First Amendment.[1] Because of the importance of the tendered issue in the domain of civil rights, we granted certiorari.[2] — U. S. —.

Since the proceedings were not treated as judicial by the Supreme Court of Illinois, the record is not in the customary form. It shows accurately, however, the steps by which the issue was

[1] Fourteenth Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

Cf. Board of Education v. Barnette, 319 U. S. 624, 639.

[2] The petition for certiorari was not accompanied by a certified record. Rule 38(1). It alleged an inability to obtain a record from the Clerk of the Supreme Court of Illinois because the documents were not in that official's custody. See note 8, *infra*. No opposing brief was filed. After the expiration of the time for opposing briefs, rule 38(3), a rule issued "returnable within 30 days, requiring the Supreme Court of Illinois to show cause why the record in this proceeding should not be certified to this Court and also why the petition for writ of certiorari herein should not be granted." Journal, Supreme Court of the United States, October Term, 1944, p. 6. A return was duly made by the Chief Justice and the Associate Justices of the Supreme Court of Illinois which stated the position of the justices on the certification of the supposed and alleged record and their opposition to the granting of the certiorari. On consideration our writ of certiorari issued, directed to the Honorable, the Judges of the Supreme Court of Illinois, commanding that

developed and the action of the Supreme Court on the prayer for admission to the practice of law in the State of Illinois. From the record it appears that Clyde Wilson Summers has complied with all prerequisites for admission to the bar of Illinois except that he has not obtained the certificate of the Committee on Character and Fitness. Cf. Illinois Revised Statutes 1943, c. 110, § 259.58. No report appears in the record from the Committee. An unofficial letter from the Secretary gives his personal views.[3] A petition was filed in the Supreme Court on August 2, 1943, which alleged that petitioner was informed in January, 1943, that the Committee declined to sign a favorable certificate. The petition set out that the sole reason for the Committee's refusal was that petitioner was a conscientious objector to war, and averred that such reason did not justify his exclusion because of the due process clause of the Fourteenth Amendment. The denial of the petition for admission is informal. It consists of a letter of September 20, 1943, to the Secretary of the Committee which is set out below,[4] a letter of the same date to Mr. Summers and a third letter of March 22, 1944, to Mr. Summers' attorney on petition for rehearing. These latter two letters are set out in note 8.

The answer of the Justices to these allegations does not appear in the record which was transmitted from the Supreme Court of Illinois to this Court but in their return to the rule to show cause

"the record and/or papers and proceedings" be sent to this Court for review." Journal, Supreme Court of the United States, October Term, 1944, p. 93. The papers comprising the proceedings before the Supreme Court of Illinois were certified to us by the Clerk of that court.

[3] In part it reads:

"I think the record establishes that you are a conscientious objector,—also that your philosophical beliefs go further. You eschew the use of force, regardless of circumstances but the law which you profess to embrace and which you teach and would practice is not an abstraction observed through mutual respect. It is real. It is the result of experience of man in an imperfect world, necessary we believe to restrain the strong and protect the weak. It recognizes the right even of the individual to use force under certain circumstances and commands the use of force to obtain its observance.

"I do not argue against your religious beliefs or your philosophy of non-violence. My point is merely that your position seems inconsistent with the obligation of an attorney at law."

[4] "This Court has an elaborate petition filed by Francis Heisler, an attorney of 27 West Washington Street, Chicago, Illinois, on behalf of Clyde Wilson Summers.

"The substance of the petition is that the Board should overrule the action of the Committee on Character and Fitness, in which the Committee refused to give him a certificate because he is a conscientious objector, and for that reason refused to register or participate in the present national emergency.

"I am directed to advise you that the Court is of the opinion that the report of the Committee on Character and Fitness should be sustained.

"Yours very truly, (Signed) June C. Smith, Chief Justice."

why certiorari should not be granted. The answer is two-fold: First, that the proceedings were not a matter of judicial cognizance in Illinois and that no case or controversy exists in this Court under Article III of the Federal Constitution; second, that assuming the sole ground for refusing to petitioner admission to practice was his profession of conscientious objection to military service, such refusal did not violate the Fourteenth Amendment because the requirement for applicants for admission to the bar to take an oath to support the Constitution of Illinois could not be met. In view of his religious affirmations, petitioner could not agree, freely, to serve in the Illinois militia. Therefore petitioner was not barred because of his religion but because he could not in good faith take the prescribed oath, even though he might be willing to do so. We turn to consideration of the Justices' contentions.

Case or Controversy. The return of the Chief Justice and the Associate Justices states that the correspondence and communications of petitioner with the Justices were not spread upon the records of the Supreme Court of Illinois and that under the law of Illinois this petition for admission to the bar does not constitute a case or controversy or a judicial proceeding but is a mere application for appointment as an officer of the court.[5] We of course accept this authoritative commentary upon the law of Illinois as establishing for that state the non-judicial character of an application for admission to the bar.[6] We take it that the law of Illinois treats the action of the Supreme Court on this petition as a ministerial act which is performed by virtue of the judicial power, such as the appointment of a clerk or bailiff or the specification of the requirements of eligibility or the course of study for applicants for admission to the bar, rather than a judicial proceeding.

For the purpose of determining whether the action of the Supreme Court of Illinois in denying Summers' petition for an order

[5] Other courts reason to the contrary result. Ex parte Secombe, 19 How. 9, 15; Ex parte Garland, 4 Wall. 333; Randall *v.* Brigham, 7 Wall. 523, 535; In the Matter of the Application of Henry W. Cooper, 22 N. Y. 67; Ex parte Cashin, 128 Miss. 224, 232.

[6] Illinois considers that the power and jurisdiction of its Supreme Court with respect to the admission of attorneys are inherent in the judiciary under the constitution of the state, which provides, Article III, for the traditional distribution of the powers of government. Smith Hurd Illinois Anno. Statutes, Constitution, p. 394; In re Day, 181 Ill. 73, 82. Attorneys are officers of the court, answerable to it for their conduct. People *v.* Peoples Stock Yards State Bank, 344 Ill. 462, 470. The act of admission is an exercise of judicial power, *id.*, 470, a judgment, In re Day, at p. 97, even though it is not considered a judicial proceeding. In the exercise of its judicial power over the

for admission to practice law in Illinois is a judgment in a judicial proceeding which involves a case or controversy reviewable in this Court under Article III, Sec. 2, Cl. 1, of the Constitution of the United States,[7] we must for ourselves appraise the circumstances of the refusal. *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 259. Cf. *Bridges* v. *California*, 314 U. S. 252, 259-60; *Nixon* v. *Condon*, 286 U. S. 73, 88; *First National Bank* v. *Hartford*, 273 U. S. 548, 552; *Truax* v. *Corrigan*, 257 U. S. 312, 324.

A case arises, within the meaning of the Constitution, when any question respecting the Constitution, treaties or laws of the United States has assumed "such a form that the judicial power is capable of acting on it." *Osborn* v. *Bank*, 9 Wheat., 738, 819. The Court was then considering the power of the bank to sue in the federal courts. A declaration on rights as they stand must be sought, not on rights which may arise in the future, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226, and there must be an actual controversy over an issue, not a desire for an abstract declaration of the law. *Muskrat* v. *United States*, 219 U. S. 346, 361; *Fairchild* v. *Hughes*, 258 U. S. 126, 129. The form of the proceeding is not significant. It is the nature and effect which is controlling. *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 259.

The brief for the Justices raises the question as to who are the adversary parties. The petition in the state court was entitled, "Clyde Wilson, Summers, Petitioner, v. Committee on Character and Fitness for Third Appellate District, Respondent." The prayer sought relief against those named as respondents. The record does not show that any process issued or that any appearance was made. Our rule on the petition for certiorari required the Supreme Court of Illinois to show cause why a record should not be certified and the writ of certiorari granted. The return

bar, the Supreme Court of Illinois has adopted rules for admission to practice before the courts of that state which permit the admission by the Supreme Court after satisfactory examination by the Board of Law Examiners which includes a certification by a Committee on Character and Fitness as to the applicant's character and moral fitness. Illinois Revised Statutes 1943, c. 110, § 259.58.

[7] Constitution, Art. III, Sec. 2, cl. 1: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

was by the Justices, not by the Court. The Supreme Court of Illinois, however, concluded that the "report of the Committee on Character and Fitness should be sustained." Thus it considered the petition on its merits. While no entry was placed by the Clerk in the file, on a docket, or in a judgment roll, the Court took cognizance of the petition and passed an order which is validated by the signature of the presiding officer.[8] Where relief is thus sought in a State court against the action of a committee, appointed to advise the court, and the court takes cognizance of the complaint without requiring the appearance of the committee or its members, we think the consideration of the petition by the Supreme Court, the body which has authority itself by its own act to give the relief sought, makes the proceeding adversary in the sense of a true case or controversy.

A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made by judicial order, it is a case which may be reviewed under Article III of

[8] The act of adjudging to which we have referred is contained in a letter addressed to petitioner, which reads as follows:

"Your petition to be admitted to the bar, notwithstanding the unfavorable report of the Committee on Character and Fitness for the Third Appellate Court District, has received the consideration of the Court.

"I am directed to advise you that the Court is of the opinion that the report of the Committee on Character and Fitness should be sustained.

"Yours very truly (Signed) June C. Smith, Chief Justice."

The letter was certified by the Clerk of the Supreme Court of Illinois under its seal as "filed in this office ——— in a certain cause entitled in this Court, Non Record No. 462. In Re Clyde Wilson Summers."

Later another letter was written in regard to the admission which reads as follows:

"March 22, 1944.

"Mr. Francis Heisler, Attorney at Law, 77 West Washington Street,
"Suite 1324, Chicago 2, Illinois.

"In re: Clyde Wilson Summers.

"Dear Sir:

"Your petition on behalf of Clyde Wilson Summers to reconsider the prior action of the Court sustaining the report of the Committee on Character and Fitness for the Third Appellate Court District, has had the consideration of the Court.

"I am directed to advise you that the Court declines to further consider its former action in this matter.

"Yours very truly, June C. Smith, Chief Justice."

By stipulation of petitioner and the Justices, the Clerk prepared a supplemental record in this cause which includes the following: (1) a transcript of the proceedings before the Character Committee; (2) the letter of March 22, 1944; (3) a certificate that the transcript is the original and the letter a document of the Supreme Court of Illinois.

the Constitution when federal questions are raised and proper steps taken to that end, in this Court.[9]

Disqualification Under Illinois Constitution. The Justices justify their refusal to admit petitioner to practice before the courts of Illinois on the ground of petitioner's inability to take in good faith the required oath to support the Constitution of Illinois. His inability to take such an oath, the justices submit, shows that the Committee on Character and Fitness properly refused to certify to his moral character and moral fitness to be an officer of the Court, charged with the administration of justice under the Illinois law. His good citizenship, they think, judged by the standards required for practicing law in Illinois, is not satisfactorily shown.[10] A conscientious belief in non-violence to the extent that the believer will not use force to prevent wrong, no matter how aggravated, and so cannot swear in good faith to support the Illinois Constitution, the Justices contend, must disqualify such a believer for admission.

Petitioner appraises the denial of admission from the viewpoint of a religionist. He said in his petition:

"The so-called 'misconduct' for which petitioner could be reproached for is his taking the New Testament too seriously. Instead of merely reading or preaching the Sermon on the Mount, he tries to practice it. The only fault of the petitioner consists in his attempt to act as a good Christian in accordance with his interpretation of the Bible, and according to the dictates of his

[9] In Bradwell v. The State, 16 Wall. 130, this Court took cognizance of a writ of error to an order of the Supreme Court of Illinois which denied a motion of Mrs. Bradwell for admission to the bar of Illinois. The proceeding was entitled by the Supreme Court of Illinois, "In the matter of the application of Mrs. Myra Bradwell for a license to practice as an attorney-at-law." There was an opinion. A writ of error under the Illinois title was issued to bring up the case. The objection to Mrs. Bradwell's admission was on the ground of her sex. As no question was raised as to the jurisdiction of this Court under Article III of the Constitution, the case is of little, if any, value as a precedent on that point. Arant v. Lane, 245 U. S. 166, 170; United States v. More, 3 Cranch 159, 172.

[10] Section IX (2) of the Rules for Admission to the Bar reads as follows: "Before admission to the Bar, each applicant shall be passed upon by the Committee in his district as to his character and moral fitness. He shall furnish the Committee with an affidavit in such form as the Board of Law Examiners shall prescribe concerning his history and environments, together with the affidavits of at least three reputable persons personally acquainted with him residing in the county in which the applicant resides, each certifying that the applicant is known to the affiant to be of good moral character and general fitness to practice law, setting forth in detail the facts upon which such knowledge is based. Each applicant shall appear before the Committee of his district or some member thereof and shall furnish the Committee such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the Bar." Ill. Rev. Stat. 1943, c. 110, § 259.58.

conscience. We respectfully submit that the profession of law does not shut its gates to persons who have qualified in all other respects, even when they follow in the footsteps of that Great Teacher of mankind who delivered the Sermon *on* the Mount. We respectfully submit that under our Constitutional guarantees even good Christians who have met all the requirements for the admission to the bar may be admitted to practice law."

Thus a court created to administer the laws of Illinois, as it understands them and charged particularly with the protection of justice in the courts of Illinois through supervision of admissions to the bar found itself faced with the dilemma of excluding an applicant whom it deemed disqualified for the responsibilities of the profession of law or of admitting the applicant because of its deeply rooted tradition in freedom of belief. The responsibility for choice as to the personnel of its bar rests with Illinois. Only a decision which violated a federal right secured by the Fourteenth Amendment would authorize our intervention. It is said that the action of the Supreme Court of Illinois is contrary to the principles of that portion of the First Amendment which guarantees the free exercise of religion. Of course, under our Constitutional system, men could not be excluded from the practice of law, or indeed from following any other calling, simply because they belong to any of our religious groups, whether Protestant, Catholic, Quaker or Jewish, assuming it conceivable that any state of the Union would draw such a religious line. We cannot say that any such purpose to discriminate motivated the action of the Illinois Supreme Court.

The sincerity of petitioner's beliefs are not questioned. He has been classified as a conscientious objector under the Selective Training and Service Act of 1940, 54 Stat. 885, as amended. Without detailing petitioner's testimony before the Committee or his subsequent statements in the record, his position may be compendiously stated as one of non-violence. Petitioner will not serve in the armed forces. While he recognizes a difference between the military and police forces, he would not act in the latter to coerce threatened violations. Petitioner would not use force to meet aggressions against himself or his family, no matter how aggravated or whether or not carrying a danger of bodily harm to himself or others. He is a believer in passive resistance. We need to consider only his attitude toward service in the armed forces.

Illinois has constitutional provisions which require service in

the militia in time of war of men of petitioner's age group.[11] The return of the Justices alleges that petitioner has not made any showing that he would serve notwithstanding his conscientious objections. This allegation is undenied in the record and unchallenged by brief. We accept the allegation as to unwillingness to serve in the militia as established. While under Section 5(g) of the Selective Training and Service Act, *supra*, conscientious objectors to participation in war in any form now are permitted to do non-war work of national importance, this is by grace of Congressional recognition of their beliefs. *Hamilton* v. *Regents*, 293 U. S. 245, 261-65, and cases cited. The Act may be repealed. No similar exemption during war exists under Illinois law. The *Hamilton* decision was made in 1934, in time of peace.[12] This decision as to the powers of the state government over military training is applicable to the power of Illinois to require military service from her citizens.

The United States does not admit to citizenship the alien who refuses to pledge military service. *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605. Even the powerful dissents which emphasized the deep cleavage in this Court on the issue of admission to citizenship did not challenge the right of Congress to require military service from every able-bodied man. 279 U. S. at 653; 283 U. S. at 632. It is impossible for us to conclude that the insistence of Illinois that an officer who is charged with the administration of justice must take an oath to support the Constitution of Illinois and Illinois' interpretation of that oath to require a willingness to perform military service

---

[11] "The militia of the state of Illinois shall consist of all able-bodied male persons resident in the state, between the ages of eighteen and forty-five, except such persons as now are, or hereafter may be, exempted by the laws of the United States, or of this state." (Constitution of Illinois, Art. XII, Sec. 1, Ill. Rev. Stat. 1943.)

"No person having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace: *Provided*, such person shall pay an equivalent for such exemption." (Constitution of Illinois, Art. XII, Sec. 6, Ill. Rev. Stat. 1943.)"

[12] California imposed instruction in military tactics on male students in the University of California. Some students sought exemption from this training on the ground that such training was inconsistent with their religious beliefs. This Court denied them any such exemption based on the due process clause of the federal Constitution. The opinion states, at pp. 262-63:

"'Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies. *Selective Draft Law Cases*, *supra*, p. 378. *Minor* v. *Happersett*, 21 Wall. 162, 166.'"

violates the principles of religious freedom which the Fourteenth Amendment secures against state action, when a like interpretation of a similar oath as to the Federal Constitution bars an alien from national citizenship.[13]

Affirmed.

---

[13] United States *v.* Macintosh, 283 U. S. 605, 625-26:

"If the attitude of this claimant, as shown by his statements and the inferences properly to be deduced from them, be held immaterial to the question of his fitness for admission to citizenship, where shall the line be drawn? Upon what ground of distinction may we hereafter reject another applicant who shall express his willingness to respect any particular principle of the Constitution or obey any future statute only upon the condition that he shall entertain the opinion that it is morally justified? The applicant's attitude, in effect, is a refusal to take the oath of allegiance except in an altered form. The qualifications upon which he insists, it is true, are made by parol and not by way of written amendment to the oath; but the substance is the same."

Mr. Justice BLACK, dissenting.

The State of Illinois has denied the petitioner the right to practice his profession and to earn his living as a lawyer. It has denied him a license on the ground that his present religious beliefs disqualify him for membership in the legal profession. The question is, therefore, whether a state which requires a license as a prerequisite to practicing law can deny an applicant a license solely because of his deeply-rooted religious convictions. The fact that petitioner measures up to every other requirement for admission to the Bar set by the State demonstrates beyond doubt that the only reason for his rejection was his religious beliefs.

The state does not deny that petitioner possesses the following qualifications:

He is honest, moral, and intelligent, has had a college and a law school education. He has been a law professor and fully measures up to the high standards of legal knowledge Illinois has set as a prerequisite to admission to practice law in that State. He has never been convicted for, or charged with, a violation of law. That he would serve his clients faithfully and efficiently if admitted to practice is not denied. His ideals of what a lawyer should be indicate that his activities would not reflect discredit upon the bar, that he would strive to make the legal system a more effective instrument of justice. Because he thinks that "Lawsuits do not bring love and brotherliness—just create antagonisms, he would, as a lawyer, exert himself to adjust controversies out of court, but would vigorously press his client's cause in court if

efforts to adjust failed. Explaining to his examiners some of the reasons why he wanted to be a lawyer, he told them; "I think there is a lot of work to be done in the law. . . . I think the law has a place to see to it that every man has a chance to eat and a chance to live equally. I think the law has a place where people can go and get justice done for themselves without paying too much, for the bulk of people that are too poor." No one contends that such a vision of the law in action is either illegal or reprehensible. The petitioner's disqualifying religious beliefs stem chiefly from a study of the New Testament and a literal acceptance of the teachings of Christ as he understands them. Those beliefs are these:

He is opposed to the use of force for either offensive or defensive purposes. The taking of human life under any circumstances he believes to be against the Law of God and contrary to the best interests of man. He would if he could, he told his examiners, obey to the letter these precepts of Christ: "Love your Enemies; Do good to those that hate you; Even though your enemy strike you on your right cheek, turn to him your left cheek also."[1] The record of his evidence before us bears convincing marks of the deep sincerity of his convictions, and counsel for Illinois with commendable candor does not question the genuineness of his professions.

I cannot believe that a state statute would be consistent with our constitutional guarantee of freedom of religion if it specifically denied the right to practice law to all members of one of our great religious groups, Protestant, Catholic, or Jewish. Yet the Quakers have had a long and honorable part in the growth of our nation, and an amicus curiae brief filed in their behalf informs us that under the test applied to this petitioner, not one of them could qualify for the bar in Illinois. And it is obvious that the same disqualification would exist as to every conscientious objector to the use of force, even though the Congress of the United States should continue its practice of absolving them from military service. The conclusion seems to me inescapable that if Illinois

[1] The quotations are the petitioner's paraphrase of the King James translation of Verses 38, 39 and 44 of St. Matthew, Chapter 5, which read as follows:

"Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth:

"But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also . . .

"But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you; . . ."

can bar this petitioner from the practice of law it can bar every person from every public occupation solely because he believes in non-resistance rather than in force. For a lawyer is no more subject to call for military duty than a plumber, a highway worker, a Secretary of State, or a prison chaplain.

It may be, as many people think, that Christ's Gospel of love and submission is not suited to a world in which men still fight and kill one another. But I am not ready to say that a mere profession of belief in that Gospel is a sufficient reason to keep otherwise well qualified men out of the legal profession, or to drive law-abiding lawyers of that belief out of the profession, which would be the next logical development.

Nor am I willing to say that such a belief can be penalized through the circuitous method of prescribing an oath, and then barring an applicant on the ground that his present belief might later prompt him to do or refrain from doing something that might violate that oath. Test oaths, designed to impose civil disabilities upon men for their beliefs rather than for unlawful conduct, were an abomination to the founders of this nation. This feeling was made manifest in Article VI of the Constitution which provides that "no religious test shall ever be required as a Qualification to any Office or public Trust in the United States." *Cummings* v. *The State of Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333.

The state's denial of petitioner's application to practice law resolves itself into a holding that it is lawfully required that all lawyers take an oath to support the state constitution and that petitioner's religious convictions against the use of force make it impossible for him to observe that oath. The petitioner denies this and is willing to take the oath. The particular constitutional provision involved authorizes the legislature to draft Illinois citizens from 18 to 45 years of age for militia service. It can be assumed that the State of Illinois has the constitutional power to draft conscientious objectors for war duty and to punish them for a refusal to serve as soldiers,—powers which this Court held the United States possesses in *United States* v. *Schwimmer*, 279 U. S. 644, and *United States* v. *McIntosh*, 283 U. S. 605. But that is not to say that Illinois could constitutionally use the test oath it did in this case. In the *Schwimmer* and *McIntosh* cases aliens were barred from naturalization because their then religious beliefs would bar them from bearing arms to defend the country. Dissents in both cases rested in part on the premise that religious

tests are incompatible with our constitutional guarantee of freedom of thought and religion. In the *Schwimmer* case dissent, Mr. Justice Holmes said that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country." pp. 654-655. In the *McIntosh* case dissent, Mr. Chief Justice Hughes said, "To conclude that the general oath of office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of the Congress but as repugnant to the fundamental principle of representative government." p. 632. I agree with the constitutional philosophy underlying the dissents of Mr. Justice Holmes and Mr. Chief Justice Hughes.

The Illinois Constitution itself prohibits the draft of conscientious objectors except in time of war and also excepts from militia duty persons who are "exempted by the laws of the United States." It has not drafted men into the militia since 1864, and if it ever should again, no one can say that it will not, as has the Congress of the United States, exempt men who honestly entertain the views that this petitioner does. Thus the probability that Illinois would ever call the petitioner to serve in a war has little more reality than an imaginary quantity in mathematics.

I cannot agree that a state can lawfully bar from a semi-public position a well-qualified man of good character solely because he entertains a religious belief which might prompt him at some time in the future to violate a law which has not yet been and may never be enacted. Under our Constitution men are punished for what they do or fail to do and not for what they think and believe. Freedom to think, to believe, and to worship, has too exalted a position in our country to be penalized on such an illusory basis. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 643-646.

I would reverse the decision of the State Supreme Court.

Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge concur in this opinion.